Supreme Court, U.S.
FILED

No. 04-

04 468 OCT 04 2004
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IN THE

Supreme Court of the United States

AG INDUSTRIAL MANUFACTURING INC.
and CLAUDE E. BROWN,

Petitioners,

v.

WATERKEEPERS NORTHERN CALIFORNIA,
a non-profit corporation dba DELTAKEEPER
and BILL JENNINGS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Ninth Circuit reversed the district court's determination that it lacked subject matter jurisdiction over a private citizen's action seeking to enforce provisions of the Clean Water Act ("the Act"), 86 Stat. 816, 33 U.S.C. §§ 1251, *et seq.* and the General Permit issued by the State of California. Standing to initiate such an action exists if certain pre-suit notice conditions contained in 33 U.S.C. § 1365(b)(1)(A) as augmented by regulation promulgated by the Administrator of the Environmental Protection Agency ("EPA") at 40 C.F.R. § 135.3(a) are satisfied. In that context, the pending Petition presents the following issues:

1. Whether the required 60 day notice of intent-to-sue establishes standing and subject matter jurisdiction when petitioners, who in advance of the sending of the notice made no efforts to comply with the Act or California's General Permit, upon receipt of the 60-day notice and in advance of the filing of respondents' complaint took steps to place the light industrial manufacturing facility owned by petitioner Ag Industrial Manufacturing, Inc. ("Aim") in compliance with the Act and California's General Permit.

2. Whether respondents can assert in "good-faith" that the 60-day intent-to-sue notice supplies adequate notice of the "specific standard, limitation or order alleged to have constituted a violation" and the dates of alleged violations within the requirements of 40 C.F.R. § 135.3(a) so as to confer standing and subject matter jurisdiction where: (i) California's General Permit provides that a light industrial facility of the type owned by Aim is not subject to any effluent limitations for storm water discharged from that facility;

(ii) respondent Bill Jennings testified he once saw an Aim employee using a hose to wash something but never saw that non-storm water discharge exit the Aim facility; (iii) respondents never collected samples, much less tested for pollutants, of storm water being discharged into the protected waterway; and (iv) respondents supplied an incomplete and contradictory list of dates and amounts of rainfall at two rainfall stations at least 15 miles from Aim's facility asserting in their notice that wrongful storm water discharge occurs each calendar day that rainfall exceeds one-tenth of one inch which assertion is subsequently invalidated by the testimony of respondents' expert witness.

LIST OF PARTIES

The parties are as listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Ag Industrial Manufacturing, Inc. ("Aim") is a California corporation. It has no parent or subsidiary corporation. No publicly held company has any ownership interest in Aim. Aim has two shareholders being Paul Burkner and petitioner, Claude E. Brown, who is Aim's President.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vi
TABLE OF APPENDICES	x
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	9
I. REVIEW IS WARRANTED TO AVOID UNNECESSARY EXHAUSTION OF JUDICIAL RESOURCES AND ENCOURAGE VOLUNTARY COMPLIANCE WITH THE ACT.	12

Contents

Page

A. The Ninth Circuit Has Destroyed the EPA Requirement that Notice Be "Specific" In Describing the Alleged Violation to Include the Dates of Violation. 12

B. Subject Matter Jurisdiction Can Only Be Determined Based Upon Facts that Exist on the Date the Complaint Is Filed. ... 16

C. The EPA's Requirement that the Notice Be "Specific" Must Be Upheld So that a Determination Can Be Made that Alleged Violations of the Act Are Made in "Good-Faith". 21

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizonans for Official English v. Arizona,
520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170
(1997) 19

Bender v. Williamsport Area School Dist.,
475 U.S. 534, 106 S. Ct. 1326, 89 L. Ed. 2d 501
(1986) 19

Cmty. Ass'n for Restoration of the Env't v.
Henry Bosma Dairy,
305 F.3d 943 (9th Cir. 2002) 14

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay
Foundation, Inc.,
484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306
(1987) ..... *passim*

Hallstrom v. Tillamook County,
493 U.S. 20, 110 S. Ct. 304, 107 L. Ed. 2d 237
(1989) 10

KVOS, Inc. v. Associated Press,
299 U.S. 269, 57 S. Ct. 197, 81 L. Ed. 183 (1936)
..... 17

Land v. Dollar,
330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209
(1947) 16-17

Cited Authorities

Page

Mansfield, C.&L.M.R. Co. v. Swan,
111 U.S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884) 19

McNutt v. General Motors Acceptance Corp.,
298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936) 17

Mitchell v. Maurer,
293 U.S. 237, 55 S. Ct. 162, 79 L. Ed. 3381 (1934) 19

Mollan v. Torrance,
9 Wheat. 537, 6 L. Ed. 154 (1824) 16

Natural Res. Def. Council v. Southwest Marine, Inc.,
236 F.3d 985 (9th Cir. 2000) 12, 13, 14

Ruhrgas AG v. Marathon Oil Co.,
526 U.S. 574, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999) 19

San Francisco BayKeeper, Inc. v. Tosco Corp,
309 F.3d 1153 (9th Cir. 2002) 14, 15

Smith v. Sperling,
354 U.S. 91, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (1957) 16

Cited Authorities

Page

Steel Company v. Citizens For a Better Environment, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) 10, 18, 19

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938) 16

Thomson v. Gaskill, 315 U.S. 442, 62 S. Ct. 673, 86 L. Ed. 951 (1942) 17

United States v. SCRAP, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 10

WaterKeepers Northern California v. AG Industrial Manufacturing, Inc., 375 F.3d 913 (9th Cir. 2004) 1, 15, 17

Federal Statutes:

40 C.F.R.
Subchapter N
§ 122.2 6
§ 122.26(c) 5
§ 135.3(a) ..... i, 4, 5, 10

Cited Authorities

	Page
28 U.S.C.	
§ 1254(1)	1
§ 1291	1
33 U.S.C.	
§ 1251	i
§ 1342(b)	5
§ 1342(p)	5
§ 1365(a)	1, 5, 16
§ 1365(b)(1)(A)	i
42 U.S.C.	
§ 6972	10
§ 11406(a)(1)	10
U.S.C.A. Const. Article III, § 2	10
State Statutes:	
Cal. Water Code § 13370	5
Other:	
California Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES General Permit No. CAS000001	5, 6, 8, 21
Federal Rules of Civil Procedure Rule 11	22

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed July 16, 2004 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court Eastern District Of California Filed December 3, 2002 ..... 19a

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *WaterKeepers Northern California v. AG Industrial Manufacturing, Inc.*, 375 F.3d 913 (9th Cir. 2004). *See* Appendix A at 1a. The Ninth Circuit reversed the unreported December 3, 2002 Memorandum and Order of the United States District Court for the Eastern District of California (*see* Appendix B at 19a) upon which a judgment of dismissal was entered.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 33 U.S.C. § 1365(a). The Ninth Circuit's jurisdiction existed pursuant to 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit's opinion was rendered on July 16, 2004.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 33 United States Code, Section 1365

Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced —

(1) under subsection (a)(1) of this section —

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action, in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under the section respecting a violation of sections 1316 and 1317(a) of this title. *Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.* [emphasis added]

. . .

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title;

(6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

. . .

Title 40, Code of Federal Regulations, Section 135.3(a)

Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation or order alleged to have constituted a violation, the person or persons responsible for the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

STATEMENT OF THE CASE

1. On June 28, 2000, respondents attempted to comply with 33 U.S.C. § 1365(a) and 40 C.F.R. § 135.3(a) by mailing their 60-day intent-to-sue letter (hereafter, "the Notice") to petitioner Aim. It is undisputed that in advance of that mailing, Aim had made no effort to comply with the Act and California's General Permit.[1]

The Act is administered largely through the National Pollution Discharge Elimination System ("NPDES") permit program. *See* 33 U.S.C. § 1342(p). Much of the responsibility for administering the NPDES permit system has been delegated to the states. *See* 33 U.S.C. § 1342(b) and Cal. Water Code § 13370 (expressing California's intent to implement its own NPDES permit program.) Pursuant to 40 C.F.R. § 122.26(c), California has issued one general permit to cover industrial dischargers who are not subject to the specific effluent limitations set forth in 40 C.F.R., Subchapter N. California Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES General Permit No. CAS000001 ("the General Permit").[2]

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1. While irrelevant to the pending petition, petitioners assert that until receipt of the Notice they were ignorant of the potential applicability of the Act and the General Permit to the Aim facility.

2. The Order issuing the General Permit specifically provides that there are no numerical effluent limitations as follows:

> 9. For facilities which do not have established effluent limitation guidelines for storm water discharges in 40 C.F.R. Subchapter N, it is not feasible at this time to establish numeric effluent limitations. This is due to the large number of discharges and the complex nature of storm water discharges.

General Permit Order, Addendum at ¶ 9, p. 14.

To elect coverage under the General Permit, individual dischargers must file a notice of intent with the state. General Permit at 1-2 ¶ 3. Thereafter, the discharger must develop and implement a Storm Water Pollution Prevention Plan ("SWPPP") and develop and implement a comprehensive storm water discharge monitoring, sampling[3] and reporting program. General Permit at 24-25 ¶¶ B.1-B.15. The SWPPP has two major objectives: (a) to identify and evaluate pollutant sources associated with industrial activity which may affect the quality of water discharge; and (b) to identify and implement best management practices ("BMPs") to reduce or prevent pollutants associated with industrial activities in water discharge. General Permit at 11, ¶ A.2. BMPs are defined at 40 C.F.R. § 122.2 and a listing of potential non-structural and structural BMPs is set forth in the General Permit at 19-21, ¶¶ A.8.

Aim is a small light industrial manufacturing facility with a net worth of less than $1 million. Aim is located in the City of Lodi, California, approximately one mile from the Mokelumne River which the Notice specified as being the protected waterway affected by Aim's alleged wrongful discharge. Aim storm water discharge does not directly flow to the Mokelumne River but some storm water discharge may reach the Mokelumne River through the City of Lodi's storm drain system. Aim sells agricultural equipment manufactured by it or others primarily focusing upon the wine grape industry employing approximately 40 people at peak season.

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3. Samples are to be collected at least twice during the "wet" season and are to be analyzed by a certified laboratory for certain specified elements such as total suspended solids as well as any toxic chemicals and other pollutants that are likely to be present in significant quantities. General Permit at 27, ¶ B.5.c.

Aim also services and repairs the equipment which it manufactures or sells although frequently such activity occurs in the field.

Respondents' Notice correctly asserted that as of June 28, 2000, Aim had not filed a notice of intent, prepared a SWPPP or developed and implemented a comprehensive storm water monitoring and reporting program. Respondents conducted no analysis of storm water discharge from the Aim facility. Respondents conducted no analysis of storm water discharge into the Mokelumne River at the point the City of Lodi's storm drain system discharged into that waterway. Respondent Bill Jennings saw an Aim employee using a hose to wash something (i.e., non-storm water); however, Mr. Jennings did not see any non-storm water discharge leaving the Aim facility.[4]

Nevertheless, respondents' Notice further asserted that on unspecified dates Aim illegally discharged non-storm water whenever equipment was hosed down and illegally discharged storm water whenever daily rainfall exceeded one-tenth of one inch as reflected on enclosed rainfall data. That data purported to reflect rainfall events by date and amount occurring at two separate reporting stations both of which were more than 15 miles from the Aim facility. The data was frequently incomplete and contradictory. Steven Bond, respondents' expert witness, admitted at his deposition that it was incorrect to assert that storm water discharge of one-tenth of one inch was sufficient the generate sufficient flow to reach the Mokelumne River and that .19 inch must occur for such discharge to reach the protected waterway.

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4. Mr. Jennings conducted his initial drive by inspection of the Aim facility on August 8, 1999 or nearly one year in advance of sending the Notice.

Upon receipt of the Notice, petitioners immediately retained the services of Dan Barber, a professional engineer, to get the Aim facility into compliance and filed a notice of intent for Aim with the State of California on July 7, 2000. By July 21, 2000 Aim had developed a SWPPP which contained several BMPs as well as a storm water discharge monitoring[5] and reporting program. Respondents knew of Aim's notice of intent and had received a copy of Aim's SWPPP before they filed their Complaint initiating the pending case.

Respondents assert that so long as the Notice in good faith asserted on the date it was mailed that Aim's facility was not in compliance with the General Permit, it is irrelevant to the issue of subject matter jurisdiction and standing what steps Aim had taken to get into compliance with the Act before the respondents filed their Complaint.

2. Respondents filed their Complaint in the United States District Court for the Eastern District of California [Sacramento Division] on September 12, 2000. Even though respondents knew of Aim's filed notice of intent and had a copy of Aim's SWPPP, that Complaint asserts several distinct claims of violation of the Act through the failure to file a notice of intent, the failure to adopt a SWPPP, the failure to adopt and implement a storm water monitoring and reporting program and wrongful discharge of storm water and non-storm water. Respondents thereafter filed their motion for summary judgment requesting an award of civil penalties of $5,000,000. In response, on March 29, 2002, petitioners filed

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5. Under the General Permit, monitoring of storm water discharge is only required during day light hours at scheduled facility operating hours within the "wet" season commencing October 1 and concluding May 30. General Permit at 26, ¶¶ B.4.a and 4.b.

their motion for summary judgment a portion of which suggested that the Notice was inadequate so that the district court lacked jurisdiction. The district court agreed and entered its Memorandum and Order on December 3, 2002 upon which a judgment of dismissal was entered.

3. Respondents filed their Notice of Appeal to the Ninth Circuit Court of Appeals on December 31, 2002. The Ninth Circuit's decision reversing the district court was entered on July 16, 2004.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit position that the sole criteria to determine that subject matter jurisdiction and standing exists is whether respondents' subjective good faith exists in the accuracy of their intent-to-sue notice on the date it was mailed appears at variance with at least two earlier decisions of this Court.

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* (hereafter, "*Gwaltney*"), 484 U.S. 49, 60, 64-66, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987), this Court determined that, among other things, the purpose of the intent-to-sue notice was to allow an opportunity for voluntary compliance thereby avoiding the need to file and prosecute a private citizen's enforcement action. Inherent in *Gwaltney* is that efforts of a party alleged to be in violation of the Act to get into voluntary compliance is indeed extremely relevant on the issue of the effectiveness of the Notice at the time the Complaint is filed so that subject matter jurisdiction may become the subject of attack in a properly filed summary judgment motion if a party alleged to be in violation promptly acts to get into compliance. Indeed, the Court commented:

> . . . [I]f the plaintiffs' allegations of [standing] were in fact untrue, then the [defendants] should have moved for summary judgment on the standing issue and demonstrated . . . that the allegations were sham and raised no genuine issue of fact.

Gwaltney, supra, 484 U.S. at 66 quoting from *United States v. SCRAP*, 412 U.S. 669, 689, 93 S. Ct. 2405, 2417, 37 L. Ed. 2d 254.

In *Steel Company v. Citizens For a Better Environment* (hereafter, "*Steel Co.*"), 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) this Court determined that the 60-day intent-to-sue notice contained in a similar statute[6] which properly asserted a statutory violation when it was mailed would not support U.S.C.A. Const. Article III, § 2 standing where, upon receipt of the notice and before the complaint was filed, the alleged violator took steps which placed it in compliance.

Further, this Court has ruled that the notice requirements of another like type statute[7] permitting private citizen's enforcement actions must be strictly construed and complied with. *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S. Ct. 304, 107 L. Ed. 2d 237 (1989). The content of the notice is important and must advise the alleged violator of what conduct violates the Act and when that conduct occurred. 40 C.F.R. § 135.3(a) requires that the notice be

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6. The Emergency Planning and Community Right-To-Know Act of 1986, 100 Stat. 1755, 42 U.S.C. § 11406(a)(1).

7. Resource Conservation and Recovery Act of 1976, 90 Stat. 2825, 42 U.S.C. § 6972.

"specific". This requirement should be strictly construed and require "good-faith" efforts on the part of the sender to avoid mere speculation and conjecture by both identifying the specific standards violated and supplying all known material facts upon which the assertion of violation is made. In the context of only sixty days within which cure may be possible, specific information is required so that the alleged violator can quickly evaluate its alleged wrongful conduct and determine whether cure is possible so as to avoid unnecessary litigation.

Simply stated, how can the proper policy of avoiding unnecessary litigation and burden on the judicial system be achieved if a court looks solely to the state of events that existed at the time the intent-to-sue notice was sent as opposed to the state of events at the time the Complaint is filed. Such an approach completely ignores the 60-day grace period mandated by Congress.

This Court's guidance on the issue of the effectiveness of notice to support jurisdiction over a private citizen's action is urgently needed. New light industrial manufacturing companies who may become potentially subject to the Act start up every day. Further, California's General Permit has been recently revised so as to require, for the first time, all farming activities in California to comply with the General Permit. Specific to petitioners, they should not be required to go forward with the burden of obtaining summary judgment on the merits or even trial.

The Ninth Circuit's attitude concerning the time at which jurisdiction attaches is as of the date of sending of notice likely makes litigation inevitable and specifically rejects the notion that cure is possible before a complaint is filed.

Subjecting an alleged violator to the reality of litigation even if full compliance with the Act and California's General permit is achieved in advance of the complaint being filed does not promote the policy of encouraging voluntary compliance. Indeed, if confronted with the inevitability of litigation, the alleged violator may elect to litigate and delay compliance efforts. Any delay in compliance potentially exacerbates delay in achieving the objectives of the Act which will lead to less stress to the country's natural resources through reduced discharge of contaminants into protected waterways.

I. REVIEW IS WARRANTED TO AVOID UNNECESSARY EXHAUSTION OF JUDICIAL RESOURCES AND ENCOURAGE VOLUNTARY COMPLIANCE WITH THE ACT.

A. The Ninth Circuit Has Destroyed the EPA Requirement that Notice Be "Specific" In Describing the Alleged Violation to Include the Dates of Violation.

Natural Res. Def. Council v. Southwest Marine, Inc., 236 F.3d 985 (9th Cir. 2000) reflects the Ninth Circuit's relaxed attitude towards the adequacy of notice to support a private citizen's action. The alleged violator operated a large shipyard which removed old paint from ships and then repainted them having received a NPDES permit and a supplemental General Industrial Permit which applied to storm water discharge. Both permits required adoption of BMPs. A SWPPP was also required which must include certain specified material. The permits required that the SWPPP require that the defendant perform daily inspections to ensure compliance with its BMPs and maintain records of those inspections.

Id. at 992. Among other things, plaintiff's intent-to-sue letter asserted that the defendant was not conducting the daily inspections or maintaining records of those inspection. Shortly before the complaint was filed, the defendant adopted an amended SWPPP which attempted to address and correct various shortcomings described in plaintiffs' notice letter. At trial, the court determined the amended SWPPP was adequate; however, convincing evidence was presented that the defendant did not conduct the required daily inspections and even if it did, it did not maintain records of those inspections. *Id.* at 993.

Plaintiff's intent-to-sue letter did not provide specific dates of alleged violation. Rather it specifically described how the existing SWPPP failed to comply with the defendant's storm water permit by failing to perform daily inspections and maintain records of those inspections. On appeal, the Ninth Circuit correctly determined that subject matter jurisdiction existed; however, in doing so the Ninth Circuit addressed an issue which was unnecessary to the determination of liability given the trial court determination that there existed an ongoing and continuous failure to inspect and maintain records of those inspections. That issue was whether subject matter jurisdiction was lost as a consequence of the defendant adopting an amended adequate SWPPP after receipt of the intent-to-sue notice but in advance of filing the complaint. The Ninth Circuit held:

> If a defendant receives a proper notice letter alleging that it has failed to prepare and implement an adequate plan and, in response, prepares a new plan and begins to implement it before the complaint is filed, is the otherwise proper notice letter defective for failing to identify and discuss

> the new plan and its implementation? In those circumstances, must a citizen-plaintiff send a new notice letter? We think not. *Subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant.* [emphasis added]

Id. at 997.

Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002) involved two dairies operated by the defendant who was subject to specific effluent guidelines upon which the defendant had obtained an individual permit for storm water discharges. There was a long history of compliance problems. The State of Washington then adopted a General Dairy Permit which contained specific discharge limitations for dairies who elected to be covered by this Permit. Plaintiff's intent-to-sue letter described 12 specific violations of the General Dairy Permit. Plaintiff's complaint sought statutory penalties not only for the 12 violations identified in its notice letter but also 32 additional like type alleged violations. At trial, a total of 16 violations were ultimately established. The Ninth Circuit held that so long as the initial intent-to-sue letter was broad enough to encompass additional like type discharge violations and the additional alleged violations were "from the same source, were of the same nature, and were easily identifiable", no new notice was required and those additional claims could be included in the assessment of civil penalties. *Id.* at 950-53.

San Francisco BayKeeper, Inc. v. Tosco Corp, 309 F.3d 1153 (9th Cir. 2002) involved the unloading and storage of petroleum coke by the defendant. Plaintiff's intent-to-sue letter asserted that a violation occurred each time coke was spilled during ship unloading and supplied fourteen dates

when ships had been docked at the defendant's facility. The notice also asserted wrongful discharge "occurred on each day when the wind [was] sufficiently strong to blow coke" from storage piles into a nearby waterway. The notice further asserted whenever rain exceed one-tenth of an inch wrongful storm water discharge containing petroleum coke also occurred and supplied a list of 190 dates when rainfall exceeded one-tenth of an inch. *Id.* at 1158. The Ninth Circuit held that where an alleged violation is continuous and ongoing, the notice need not contain specific dates and, in any event, the dates of unloading of petroleum coke and when the wind blew was presumptively known to the defendant.

The Ninth Circuit's rule that whenever the alleged violation is continuous and ongoing the dates of violation either need not be stated or are presumptively known to the defendant was specifically applied to petitioners when the Ninth Circuit commented the respondents were "not required to include any rain tables under *San Francisco BayKeeper*" [375 F.3d at 918][8] and "AG Industrial is in a much better position to know when it periodically washes down areas of its facility" [375 F.3d at 919]. Effectively the Ninth Circuit has adopted a rule which states that all an intent-to-sue letter to a light industrial company not subject to specific effluent limitations need contain is a very general statement that the company violated the General Permit and the Act every time it rains or every time it allows an employee to turn on a hose for any period of time for whatever purpose and that these violations are continuous and ongoing. Not only does this rule stand in apparent disregard of the EPA regulation controlling the required contents of the intent-to-sue notice,

8. These rain tables were apparently supplied in an effort to supply date specific information when rainfall may have exceeded one-tenth of one inch at the Aim facility.

it also effectively eliminates consideration at any stage of the litigation that specific substantive allegations of violation must be made in good faith so that jurisdiction exists.

B. Subject Matter Jurisdiction Can Only Be Determined Based Upon Facts that Exist on the Date the Complaint Is Filed.

In *Gwaltney*, this Court commented that the "to be in violation" language of § 505(a)(1) of the Act, 33 U.S.C. § 1365(a) together with the remaining statutory language of the Act involving "the pervasive use of the present tense" compelled the conclusion that

> . . . the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.

Gwaltney, supra, 484 U.S. at 59

Determining subject matter jurisdiction solely upon the adequacy of the intent-to-sue notice upon the date it was sent, an event in the past, as opposed to the date the complaint is filed is patently flawed. Subject matter jurisdiction "depends on the state of things at the time of the action brought". *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154 (1824); *see, e.g., Smith v. Sperling*, 354 U.S. 91, 93 n.1, 77 S. Ct. 1112, 1113 n.1, 1 L. Ed. 2d 1205 (1957); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90, 58 S. Ct. 586, 590-91, 82 L. Ed. 845 (1938). Subject matter jurisdiction can be called into question either by challenging the sufficiency of the allegation or by challenging the accuracy of the jurisdictional facts alleged. *See, e.g., Land v. Dollar*, 330 U.S. 731, 735, n.4, 67 S. Ct. 1009, 1011 n.4,

91 L. Ed. 1209 (1947); *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S. Ct. 673, 675, 86 L. Ed. 951 (1942); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278, 57 S. Ct. 197, 201, 81 L. Ed. 183 (1936); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 785, 80 L. Ed. 1135 (1936).

A significant purpose of the intent-to-sue notice is as follows:

> . . . the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus render unnecessary a citizen suit.

Gwaltney, supra, 484 U.S. at 60.

Against one Congressional policy objective of providing a grace period to an alleged violator to opt for voluntary compliance and thereby avoid the expense of a private citizen's enforcement action, *Gwaltney* establishes that subject matter jurisdiction exists so long as allegations of continuous and ongoing violation are made in "good-faith". *Gwaltney, supra*, 484 U.S. at 64. However, there exists no sound policy reason for the Ninth Circuit rule which requires the "good-faith" determination occur as of the date of the Notice as follows:

> Regardless of whether WaterKeepers is able to prove each claimed discharge, its intent-to-sue letter put AG Industrial on notice as to the violations that WaterKeepers would allege in its complaint. The statute and regulation require no more.

375 F.3d at 918.

The Ninth Circuit rule focusing on the date the Notice was mailed makes litigation inevitable (assuming the alleged transgressor does not want to settle by stipulating to a civil penalty award) thereby unnecessarily burdening the judicial system. Such litigation provides no immediate benefit to our natural water resources where an alleged violator has voluntarily elected to place itself into compliance with the Act and the General Permit.

In determining that subject matter jurisdiction would exist upon "good-faith" allegations in the complaint, this Court cautioned:

> Our acknowledgment that Congress intended a good-faith allegation to suffice for jurisdictional purposes, however, does not give litigants license to flood the court with suits premised on baseless allegations. Rule 11 of the Federal Rules of Civil Procedure, which requires pleadings to be based on a good-faith belief, formed after reasonable inquiry, that they are "well grounded in fact," adequately protects defendants from frivolous allegations.

Gwaltney, 484 U.S. at 65.

With due respect, Rule 11 of the Federal Rules of Civil Procedure should not be the exclusive remedy of a defendant. A motion for summary judgment which leads into the conclusion that subject matter jurisdiction did not exist and standing does not exist is an appropriate way to address whether the complaint should ever have been filed. *Steel Company*, *supra*, 523 U.S. at 94-95 held a federal court must resolve any jurisdictional doubt prior to a decision on

the merits so as to avoid a constitutionally prohibited advisory opinion as follows:

> The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception". *Mansfield, C.&L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

Further this Court quoted from its then recent decision[9] unanimously setting aside a Ninth Circuit's merits decision where the case had lost the elements of a justiciable controversy as follows:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 3381 (1934).

Steel Company, supra, 523 U.S. at 95. *See also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577, 119 S. Ct. 1563, 1570-72, 143 L. Ed. 2d 760 (1999).

The issue is not whether a validly filed complaint's allegations have been rendered moot. The issue is whether the respondents could properly invoke the jurisdiction of the

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9. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S. Ct. 1055, 1071-72, 137 L. Ed. 2d 170 (1997) itself quoting from *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986).

federal courts at the time the complaint was filed. No other Circuit has followed, or refused to follow, the Ninth Circuit position on the precise issue of subject matter jurisdiction being determined as of the date of the sending of the intent-to-sue notice.

It remains undisputed in their complaint, respondents accused the petitioners of failing to file a notice of intent and failing to adopt a SWPPP and storm water monitoring program. Those allegations were no longer true when the complaint was filed. Since the respondents had actual knowledge that Aim had initiated compliance efforts with the filing of Aim's notice of intent and adoption of a SWPPP which included several BMPs as well as a storm water monitoring and reporting program, to include allegations in the complaint to the contrary can never be in "good-faith". Remaining allegations in the complaint of speculative non-storm water discharge and the level of contaminants of untested storm water discharge for a facility which is not subject to any effluent limitations in the storm water which it discharges do not remotely meet the specificity of the EPA regulation governing the contents of the intent-to-sue notice and certainly do not achieve the requirement of "good-faith" so that subject matter jurisdiction can exist. The lack of sufficient notice grows when respondents' own expert witness concedes at deposition that certain rainfall data related assertions in the Notice are inaccurate.

The district court did precisely what it was supposed to do. Confronted with cross-motions for summary judgment, the district court analyzed whether subject matter jurisdiction existed. It correctly concluded that it did not. The Ninth Circuit's reversal shall lead other courts down the wrong path.

C. The EPA's Requirement that the Notice Be "Specific" Must Be Upheld So that a Determination Can Be Made that Alleged Violations of the Act Are Made in "Good-Faith".

The Ninth Circuit has also abandoned the necessity of specific information concerning: (i) the dates of violation; and (ii) the standards and orders violated. True, the Notice contains a fairly detailed reference to the General Permit and certain of its provisions. Respondents' Notice contains only very general reference to the necessity of adopting BMPs to reduce or avoid the existence of pollutants in storm water discharge. However, the Aim facility is not subject to any specific effluent limitations in storm water discharged under the General Permit. *See* Footnote 3, *supra*. The Notice does not advise what specific BMPs should be in place at the Aim facility.

The General Permit prohibits storm water discharge which causes, or threatens to cause, otherwise unspecified receiving water limitations to be exceeded. Receiving water limitations vary for each protected waterway in California and indeed may vary as to specified portions within a protected waterway. The Notice supplies no information what those limitations are with reference to the Mokelumne River. Further, through the date cross-motions for summary judgment were filed petitioners never collected a sample of storm water discharge at the point of discharge from the City of Lodi storm drain system into the Mokelumne River nor are they aware of anyone else doing so which would determine what level, if any, that discharge from the City of Lodi storm drain system would exceed receiving water limitations.

The generality of what the Ninth Circuit believes is sufficient for subject matter jurisdiction and standing shall likely render Rule 11 completely ineffective since the sender of the notice shall likely always establish that it was at least proceeding in subjective "good-faith" when the notice was sent. However, the critical time is whether "good-faith" continues to exist at the time the complaint is filed since filing the complaint marks the point in time that Rule 11 can even start to apply.

If Rule 11 is to be an effective barrier against frivolous litigation, upholding the requirement that the intent-to-sue letter contain "specific" information best serves several public policy objectives. First and consistent with due process concerns, it provides concrete information to the alleged violator who can then quickly examine its options. Next and in the context of escalating exposure to civil penalties based upon each day of violation, limiting the scope of the intent-to-sue letter to the events specified therein encourages voluntary compliance. Finally, voluntary compliance will hopefully lead to improved conditions in protected waterways while avoiding unnecessary litigation.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 16, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-15023
D.C. No.
CV-00-01967-
MCE(PAN)

WATERKEEPERS NORTHERN CALIFORNIA, a non-profit corporation dba Deltakeeper; BILL JENNINGS,

Plaintiffs-Appellants,

v.

AG INDUSTRIAL MANUFACTURING INC.; CLAUDE E. BROWN,

Defendants-Appellees.

No. 03-15631
D.C. No.
CV-00-01967-
MCE(PAN)

WATERKEEPERS NORTHERN CALIFORNIA, a non-profit corporation dba Deltakeeper; BILL JENNINGS,

Plaintiffs-Appellees,

v.

AG INDUSTRIAL MANUFACTURING INC.; CLAUDE E. BROWN,

Defendants-Appellants.

Appendix A

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Argued and Submitted
March 8, 2004—San Francisco, California

Filed July 16, 2004.

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Chief IT Judge.*

OPINION

BETTY B. FLETCHER, Circuit Judge.

Plaintiffs WaterKeepers Northern California and Bill Jennings (collectively, "WaterKeepers") appeal the district court's dismissal of their Clean Water Act suit for lack of jurisdiction. Defendants AG Industrial Manufacturing and Claude E. Brown (collectively, "AG Industrial") cross-appeal the district court's denial of their motion as prevailing parties for attorney's fees. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse the district court's dismissal in part, affirm in part, and affirm the district court's denial of attorney's fees.

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* The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Appendix A

I.

WaterKeepers Northern California is a non-profit corporation dedicated to protecting wildlife and preserving natural resources in the San Francisco Bay and the Sacramento-San Joaquin Delta ("the Delta"). Bill Jennings is the director of DeltaKeeper, a WaterKeepers Northern California project focused specifically on the Delta. AG Industrial Manufacturing is a California company that produces farm machinery and equipment for the wine grape industry. The company was formed in 1980 and now employs approximately forty people at its Lodi facility. Claude E. Brown is the company's CEO and one of its two shareholders.

On June 28, 2000, WaterKeepers sent AG Industrial notice of its intent to sue for violations of the Clean Water Act ("the Act"). More than sixty days later, WaterKeepers filed this suit, alleging numerous continuing or recurring violations of the Act at AG Industrial's Lodi facility. The parties briefed the merits of WaterKeepers' claims in the district court, and each side submitted a motion for summary judgment. Without reaching the merits, however, the district court concluded that the suit had to be dismissed because WaterKeepers' intent-to sue letter provided insufficient notice of its claims. In a second order, the district court denied AG Industrial's motion for prevailing party attorney's fees. Although the district court found AG Industrial to be a prevailing party, it declined to award fees because it could not say that WaterKeepers' claims were "frivolous, unreasonable, or without foundation." *See Razore v. Tulalip Tribes,* 66 F.3d 236, 240 (9th Cir.1995) (adopting this standard for attorney's fees motions under the Clean Water Act).

Appendix A

We address the notice letter and attorney's fees issues in turn, but we begin with an explanation of the relevant statutory and regulatory background.

II.

Congress enacted the Clean Water Act in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251; *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 124 S.Ct. 1537, 1541 (2004). The Act prohibits the discharge of pollutants into United States waters except as authorized by the statute. 33 U.S.C. § 1311; *San Francisco BayKeeper, Inc. v. Tosco Corp.,* 309 F.3d 1153, 1156 (9th Cir.2002), *cert. dismissed,* 539 U.S. 924 (2003). The Act is administered largely through the National Pollution Discharge Elimination System ("NPDES") permit program. 33 U.S.C. § 1342. In 1987, the Act was amended to establish a framework for regulating storm water discharges through the NPDES system. Water Quality Act of 1987, Pub.L. 100- 4, § 405, 101 Stat. 7, 69 (1987) (codified at 33 U.S.C. § 1342(p)); *see also Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 840-41 (9th Cir.2003) (describing the problem of storm water runoff and summarizing the Clean Water Act's permitting scheme), *cert. denied,* 72 U.S.L.W. 3513 (U.S. June 7, 2004). The discharge of pollutants without an NPDES permit, or in violation of a permit, is illegal. *Ecological Rights Found. v. Pacific Lumber Co.,* 230 F.3d 1141, 1145 (9th Cir.2000).

Much of the responsibility for administering the NPDES permitting system has been delegated to the states. *See* 33 U.S.C. § 1342(b); *see also* Cal. Water Code § 13370

(expressing California's intent to implement its own NPDES permit program). States may issue individual permits to industrial dischargers or may cover many dischargers under the terms of one general permit. *See* 40 C.F.R. § 122.26(c); *Envtl. Def. Ctr.*, 344 F.3d at 853 (describing the general permit model). California has issued a general permit to cover industrial dischargers. State Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES General Permit No. CAS000001 (the "General Permit" or "Permit"); *Ecological Rights Found.*, 230 F.3d at 1145. In order to be covered under California's General Permit, individual dischargers must file a notice of intent with the state. General Permit at 1-2 ¶ 3.

The parties to this case agree that AG Industrial falls within an industrial classification under the Act and General Permit for which no specific pollutant effluent limitations have been set. Nonetheless, California's General Permit requires AG Industrial to identify and implement "best management practices" ("BMPs"),[1] *id.* at 4 ¶ B.3, and generally prohibits all non-storm water discharges, with a few exceptions for activities such as fire hydrant flushing

1. BMPs are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States." 40 C.F.R. § 122.2 (internal quotation marks omitted). "BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." *Id.* According to the General Permit, BMPs may be "structural" (*e.g.*, roofing, berms, treatment facilities) or "non-structural" (*e.g.*, good housekeeping, preventive maintenance, training). *See Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 991 n. 1 (9th Cir.2000).

and landscape watering. *Id.* at 3 ¶ A.1, 5 ¶ D.1. The Permit also requires dischargers to develop and implement an effective Storm Water Pollution Prevention Plan ("SWPPP"), *id.* at 11-23 ¶ A.1-A.10, and to develop and implement a comprehensive monitoring and reporting program. *Id.* at 24-35 ¶¶ B.1-B.15.

Private citizens may sue under the Clean Water Act to enforce the specific provisions of California's General Permit. 33 U.S.C. § 1365(a)(1), (f)(6); *Russian River Watershed Prot. Comm. v. City of Santa Rosa,* 142 F.3d 1136, 1139 (9th Cir.1998). In this case, WaterKeepers contends that AG Industrial has violated the Permit by discharging contaminated storm and non-storm water; by failing to develop and implement adequate BMPs; by failing to develop and implement an adequate SWPPP; and by failing to develop and implement an adequate monitoring and reporting program.

III.

The Clean Water Act requires citizen plaintiffs to notify alleged violators of their intent to sue at least sixty days before filing a complaint. 33 U.S.C. § 1365(b)(1)(A). In our circuit, compliance with this notice provision is required for jurisdiction. *See Natural Res. Def. Council v. Southwest Marine, Inc.,* 236 F.3d 985, 995 (9th Cir.2000); *cf. Hallstrom v. Tillamook County,* 493 U.S. 20, 31 (1989) (holding that notice is a mandatory prerequisite to suit under the Resource Conservation and Recovery Act but declining to decide whether the notice requirement "is jurisdictional in the strict

sense of the term"). In order to comply, a citizen plaintiff must send an intent-to-sue letter that includes

> sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, . . . [and] the date or dates of such violation.

40 C.F.R. § 135.3(a).

"The key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance." *Cmty.Ass'n for Restoration of the Env't v. Henry Bosma Dairy,* 305 F.3d 943, 951 (9th Cir.2002) [hereinafter *Bosma Dairy*]. Notice is sufficient if it is reasonably specific and if it gives "the accused company the opportunity to correct the problem." *San Francisco BayKeeper,* 309 F.3d at 1158 (quoting *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.,* 116 F.3d 814, 820 (7th Cir.1997)). Although the Act's notice requirement is "strictly construed," *Southwest Marine,* 236 F.3d at 998, plaintiffs are not required to "list every specific aspect or detail of every alleged violation." *Bosma Dairy,* 305 F.3d at 951 (quoting *Pub. Interest Research Group v. Hercules, Inc.,* 50 F.3d 1239, 1248 (3d Cir.1995)). We review the adequacy of pre-suit notice de novo. *San Francisco BayKeeper,* 309 F.3d at 1157.

Appendix A

A.

WaterKeepers sent AG Industrial a ten-page notice letter that is significantly longer and more detailed than the notice letter we held sufficient in *Southwest Marine.* 236 F.3d at 1003-08. WaterKeepers' letter describes the problem of storm water pollution in the Mokelumne River, which is a tributary to the San Joaquin River and the Delta. It specifically identifies pollutants associated with AG Industrial's operations; describes in detail the sources and practices that lead to the discharge of contaminated storm water from AG Industrial's site; and explains that non-storm water, contaminated by washing or hosing down dirty machinery or equipment, is flushed from AG Industrial's site into the storm sewer system. The letter faults AG Industrial for failing to seek coverage under California's General Permit, and accuses AG Industrial of violating the Act by discharging contaminated storm water "during at least every rain event over 0.1 inches." Two tables attached to the letter list daily rain accumulation at area sites. The letter also charges AG Industrial with violating the Act "on each and every date on which the facility discharged contaminated wash water." The letter suggests solutions for AG Industrial's storm and non-storm water discharge problems, including grading, berming, roofing, structural controls to prevent the discharge of contaminated water, and a filtration system to treat contaminated water.

With respect to prevention and monitoring requirements, WaterKeepers' letter states that AG Industrial has violated the General Permit by failing to develop and implement BMPs; by failing to implement an SWPPP; and by failing to

implement a monitoring and reporting program. The letter describes these Permit requirements in detail and directs the reader's attention to the specific Permit sections that explain what is required.

B.

The district court ruled WaterKeepers' notice letter inadequate solely on the basis of WaterKeepers' allegation regarding storm-water discharges. The district court held that WaterKeepers did not provide enough specific information about the dates of alleged storm-water discharges. Having carefully reviewed WaterKeepers' notice letter, we conclude that the district court's ruling on this point cannot be squared with our recent decision in *San Francisco BayKeeper.* San Francisco BayKeeper alleged in its notice letter that defendant Tosco Corp. illegally discharged petroleum coke "on each day when the wind [was] sufficiently strong to blow coke" from piles at Tosco's facility into a nearby waterway. *San Francisco BayKeeper,* 309 F.3d at 1159. We held this notice sufficient, even though San Francisco BayKeeper "did not provide any specific dates" for the alleged violations. *Id.* Here, WaterKeepers' notice letter states that AG Industrial discharges contaminated storm water during "every rain event over 0.1 inches." Because this allegation is as specific as San Francisco BayKeeper's, we hold that it is similarly sufficient.[2]

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2. The district court believed *San Francisco BayKeeper* to be distinguishable because the piles of petroleum coke were "so readily identifiable" as the pollution source in that case and because "the nature of potential remedial actions to be taken at the [AG Industrial] facility is by no means as clear." We do not agree that *San Francisco BayKeeper* can be distinguished in this way.

(Cont'd)

Appendix A

The district court found it significant that WaterKeepers' expert, Steven Bond, testified at deposition that storm water will not always be discharged from AG Industrial's facility after a 0.1 inch rainfall; Bond stated that a 0.19 inch standard would be more accurate. This testimony may be relevant to the merits of WaterKeepers' claims, but we do not agree with the district court that it is relevant to the adequacy of WaterKeepers' notice letter. Regardless of whether WaterKeepers is able to prove each claimed discharge, its intent-to-sue letter put AG Industrial on notice as to the violations that WaterKeepers would allege in its complaint. The statute and regulation require no more. *See* 33 U.S.C. § 1365(b)(1)(A) (explaining that notice must be given of "alleged" violations); 40 C.F.R. § 135.3(a) (same). The district court found fault with the rainfall tables WaterKeepers attached to its notice letter. The court noted that the tables record rainfall at locations some distance from AG Industrial, that data is recorded as missing on many dates

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(Cont'd)

Although no single source may be blamed for all of AG Industrial's allegedly contaminated discharges, the company's pollution problem is as easy to understand as Tosco's: AG Industrial's site is allegedly littered with contaminants, and those contaminants are carried off the site when it rains. WaterKeepers' notice letter clearly identifies the sources of AG Industrial's problem-debris, manufacturing materials and activities exposed to rainfall, and oil, grease and chemical stains throughout the facility. The letter also describes remedial steps AG Industrial could take.

As was the case in *San Francisco BayKeeper,* WaterKeepers provided notice "sufficiently specific to inform [AG Industrial] about what it is doing wrong." 309 F.3d at 1159 (citation omitted).

in one table, and that in some cases the two tables list different rainfall amounts for the same dates. Again, however, these facts are relevant to the merits, not to the adequacy of WaterKeepers' notice letter. WaterKeepers was not required to include any rain tables under *San Francisco BayKeeper,* and, even if it had been, the tables it did send provide notice of several exact dates of alleged discharge violations.[3]

C.

AG Industrial offers four alternate grounds for affirming the district court's dismissal in whole or in part. First it argues that WaterKeepers' intent-to-sue letter provided insufficient notice of the storm water standards, limitations, or orders allegedly violated. *See* 40 C.F.R. § 135.3(a). California's General Permit prohibits storm water discharges that "cause or threaten to cause pollution, contamination, or nuisance," General Permit at 4 ¶ A.2; that "adversely impact human health or the environment," *id.* at 4¶ C.1; and that "contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Board's Basin Plan." *Id.* at 4, ¶ C.2. WaterKeepers contends that AG Industrial has violated these provisions by discharging contaminated storm water that fails to meet Environmental Protection Agency ("EPA")

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3. We note that WaterKeepers submitted more complete rainfall data in support of its summary judgment motion, and that its supplemental data shows heavy rainfall on many of the same dates identified in WaterKeepers' original tables. WaterKeepers may pursue claims for the new dates included in its revised tables because the discharges alleged are all "from the same source" and "of the same nature." *Bosma Dairy,* 305 F.3d at 953.

water quality standards for California. *See* 40 C.F.R. § 131.38 (setting out quality standards for California waters, commonly known as the "California Toxics Rule"). AG Industrial argues that because WaterKeepers did not cite specifically to the California Toxics Rule in its notice letter, it cannot rely on the Rule to support its claims.

We are not persuaded. WaterKeepers' notice letter lists various contaminants believed to be at AG Industrial's site, explains how they are exposed to rainfall, and points to the specific provisions of the General Permit allegedly violated.[4] WaterKeepers' notice letter was thus "sufficiently specific to inform [AG Industrial] about what it is doing wrong."[5] *San Francisco BayKeeper,* 309 F.3d at 1159 (quoting *Southwest Marine,* 236 F.3d at 996).

AG Industrial next challenges the sufficiency of WaterKeepers' notice regarding non-storm water discharges.

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4. The General Permit is an "order" of the State Water Resources Control Board. *See* 40 C.F.R. § 135.3(a) (requiring notice that includes information sufficiently specific to allow the recipient to identify the "standard, limitation, or *order* " allegedly violated) (emphasis added).

5. For similar reasons, we reject AG Industrial's challenge to WaterKeepers' reliance on EPA benchmark values. *See* Proposed Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed.Reg. 171010, 17031 (proposed March 30, 2000) (setting out EPA benchmark values for certain contaminants). WaterKeepers points to the EPA benchmark values as evidence to support its claim that AG Industrial has failed to implement adequate BMPs. WaterKeepers satisfied the Act's notice requirement for this claim by specifically referring to the General Permit's BMP provisions in its notice letter.

Appendix A

WaterKeepers' intent-to-sue letter accuses AG Industrial of discharging contaminated non-storm water whenever it periodically washes down dirty areas of the facility or dirty machinery and equipment. "At these times," according to the letter, "contaminants present in the area are carried off by the wash water and flushed into the storm sewer system." WaterKeepers' letter alleges violations of the Act "on each and every date on which [AG Industrial's] facility has discharged contaminated wash water."

We follow *San Francisco BayKeeper* in holding that these allegations are sufficient to satisfy the Act's notice requirement. *See San Francisco BayKeeper,* 309 F.3d at 1158-59. In addition to the wind-related discharges discussed above, San Francisco BayKeeper notified defendant Tosco that it was responsible for illegal petroleum coke spills on each day of ship loading at Tosco's facility. *Id.* at 1158. We held this notice sufficient because San Francisco BayKeeper was only required to "provide sufficient information *to permit the recipients* to identify . . . the date or dates" of alleged violations and because BayKeeper's allegations were specific enough for this purpose. *Id.* at 1158-59 (omission and emphasis in the original; internal quotation marks and citation omitted). As a practical matter, BayKeeper did not have access to Tosco's complete records, and Tosco was "obviously in a better position than BayKeeper" to identify the dates of its own ship loading. *Id.* at 1158. The same is true here. AG Industrial is in a much better position to know when it periodically washes down areas of its facility, and WaterKeepers' letter provided sufficient information to permit AG Industrial to identify the nature and dates of the

alleged violations. The point of the Act's notice requirement is not to *prove* violations, it is to inform the polluter "about what it is doing wrong," and to allow it an "opportunity to correct the problem." *Id.* at 1159. (quoting *Southwest Marine,* 236 F.3d at 996, and *Atl. States Legal Found., Inc.,* 116 F.3d at 819); *see also Bosma Dairy,* 305 F.3d at 953 (explaining that Congress did not intend, in enacting the notice requirement,"to unduly burden citizens by requiring them to basically carry out the job of the [environmental enforcement] agenc[ies]"). WaterKeepers' notice letter plainly satisfies these criteria.[6]

AG Industrial argues that the district court's dismissal may be affirmed with respect to WaterKeepers' prevention, monitoring and reporting claims because AG Industrial has now cured all alleged violations. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 57-64 (1987) (holding that citizen plaintiffs may not sue for "wholly past" violations of the Clean Water Act but must instead allege "continuous or intermittent" violations). AG Industrial contends that it has now filed a notice of intent to comply

6. We note one exception to our general holding regarding non-storm water discharges. WaterKeepers' complaint and summary judgment motion refer to manufacturing "process water" or "wastewater" that is discharged from AG Industrial's facility. Because WaterKeepers' notice letter does not refer to manufacturing process water or wastewater, we affirm dismissal with respect to this claim. We doubt that this holding will have a significant effect on proceedings below, however, because at oral argument plaintiffs' counsel indicated that WaterKeepers intends to proceed only with those non-storm water claims specifically referred to in the notice letter—that is, non-storm water claims based on facility and equipment washing.

with the General Permit and that it prepared an SWPPP and a monitoring plan in July 2000, after receiving WaterKeepers' notice letter but before WaterKeepers filed its complaint. WaterKeepers responds that AG Industrial's new management practices and prevention, monitoring and reporting plans are inadequate, ineffective and fail to meet the requirements of the General Permit.

We considered a similar situation and rejected an argument nearly identical to AG Industrial's in *Southwest Marine:*

> If a defendant receives a proper notice letter alleging that it has failed to prepare and implement an adequate plan and, in response, prepares a new plan and begins to implement it before the complaint is filed, is the otherwise proper notice letter defective for failing to identify and discuss the new plan and its implementation? In those circumstances, must a citizen-plaintiff send a new notice letter? We think not. Subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant.

236 F.3d at 997 (considering "what, if any, effect Defendant's post-notice alterations of its plans and facilities had on the adequacy of the [plaintiffs'] notice letter"). Following *Southwest Marine,* we hold that WaterKeepers was not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of AG Industrial's post-notice compliance efforts. *Id.* ("Although we require

strict compliance with the [Act]'s notice requirement, we do not require citizen-plaintiffs to refer to provisions of plans that do not exist.").

Finally, AG Industrial relies on the Supreme Court's decision in *Gwaltney* to argue that we may affirm dismissal because the evidence the parties submitted on summary judgment proves that WaterKeepers did not file its complaint in "good faith." *See Gwaltney,* 484 U.S. at 64 ("[W]e agree that § 505 [of the Act] confers jurisdiction over citizen suits when the citizen-plaintiffs make a *good-faith* allegation of continuous or intermittent violation . . . .") (emphasis added). In essence, AG Industrial argues that we should look ahead to the parties' summary judgment evidence, hold that AG Industrial wins on the merits, further hold that AG Industrial's evidence is so strong that it proves WaterKeepers' complaint was not filed in good faith, and affirm dismissal because the Act only confers jurisdiction over good-faith allegations. We conclude that this argument rests on a misunderstanding of *Gwaltney.*

Gwaltney held that citizen plaintiffs may not sue to remedy "wholly past" violations of the Clean Water Act; the Act confers jurisdiction only over citizen suits that allege continuous or intermittent violations.[7] *Id.* at 56-63. *Gwaltney* did not hold, contrary to AG Industrial's suggestion, that citizen plaintiffs must prove a violation of the Act before jurisdiction attaches or that dismissal for lack of jurisdiction is the proper remedy for allegations that turn out not to have

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7. WaterKeepers' suit plainly passes this test—WaterKeepers' complaint alleges continuing and recurring violations of the Act.

been made in good faith. Instead, the Supreme Court explained that an *allegation* is sufficient to confer jurisdiction and that Fed.R.Civ.P. 11 provides the proper remedy for bad-faith claims. *See id.* at 64 ("Petitioner argues that citizen-plaintiffs must prove their allegations of ongoing noncompliance before jurisdiction attaches under [the Act]. We cannot agree.") (citation omitted); *id.* at 65 ("The statute does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be '*alleged* to be in violation.'"); *id.* ("Our acknowledgment that Congress intended a good-faith allegation to suffice for jurisdictional purposes . . . does not give litigants license to flood the courts with suits premised on baseless allegations. *Rule 11 of the Federal Rules of Civil Procedure* . . . adequately protects defendants from frivolous allegations.") (emphasis added). Adopting AG Industrial's proposed approach at this stage would ignore these teachings. Accordingly, we hold that *Gwaltney* does not require us to reach the merits of the parties' summary judgment motions in order to decide whether the district court has jurisdiction.

D.

Because it is clear under Supreme Court and Ninth Circuit precedent that the district court has jurisdiction over nearly all of WaterKeepers' claims, we cannot say that AG Industrial is a prevailing party entitled to attorney's fees under the Act. *See Razore,* 66 F.3d at 240 (explaining that a defendant is entitled to attorney's fees only if the plaintiff's claims were "frivolous, unreasonable, or without foundation").

IV.

The district court must ultimately decide whether WaterKeepers' evidence of continuous and ongoing violations is sufficient to survive summary judgment. On this appeal we hold only that the district court has jurisdiction to reach the merits of all but WaterKeepers' industrial process water claim. Accordingly, we reverse the district court's dismissal in part, affirm as to WaterKeepers' process water claim, affirm the district court's denial of attorney's fees, and remand so that the district court may reach the merits. We decline WaterKeepers' invitation to sanction AG Industrial under either Fed. R.App. P. 38 or 28 U.S.C. § 1927.Appellants are entitled to their costs.

REVERSED IN PART; AFFIRMED IN PART; AND REMANDED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA FILED DECEMBER 3, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

N0. CIV. S 00-1967 MCE PAN

WATERKEEPERS NORTHERN CALIFORNIA, a non-profit corporation, doing business as DELTAKEEPER, and BILL JENNINGS, an individual;

Plaintiffs,

v.

AG INDUSTRIAL MANUFACTURING, INC., a corporation; and CLAUDE E. BROWN, an individual;

Defendants.

MEMORANDUM AND ORDER

This is an action for violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., hereinafter referred to as the "Clean Water Act." Plaintiffs allege that Defendants AG Industrial Manufacturing, Inc. and its president, Claude E. Brown, have repeatedly discharged industrial pollution into the Mokelumne River and the San Joaquin River Delta ever since Defendants became subject to the provisions of the Clean Water Act in 1992. Plaintiffs now move for summary judgment, or alternatively for

summary adjudication of claims, on grounds that, the evidence demonstrates as a matter of law Defendants' continuing failure to comply with the requirements of the Clean Water Act. Defendants, in turn, have filed their own cross-motion for summary judgment or summary adjudication on several grounds, including the failure, by Plaintiffs, to provide adequate notice of their intent to sue as required by the Clean Water Act at 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3(a). As set forth below, the Court finds that the notice provided to Defendants was inadequate and that it accordingly lacks jurisdiction to hear this matter. Summary judgment in favor of Defendants is therefore granted.[1]

BACKGROUND

Defendant AG Industrial Manufacturing, Inc. (hereinafter "AIM") is an industrial manufacturing facility engaged in the fabrication of agriculture machinery, especially equipment used in harvesting wine grapes. The business has been located at 110 S. Beckman Rd. in Lodi, California, since its inception in 1980. Defendant Claude E. Brown is President of AIM. He has served in that capacity since the company was formed.

Plaintiff WaterKeepers Northern California (hereinafter "WaterKeepers") is a non-profit corporation dedicated to the preservation and protection of the San Francisco Bay and the Delta estuary. WaterKeepers alleges its investigation of the AIMS premises revealed fabrication activities generating

1. Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefing. E.D. Cal. Local Rule 78-230(h).

industrial pollutants that occurred outside in uncovered areas exposed to rainfall. WaterKeepers further contends that the facility contains rusting equipment and parts also exposed to the weather, as well as the presence of oily stains, waste materials and debris. Because of exposure to storm water flows and lack of essential structural controls like grading, berming and roofing, WaterKeepers contends that both storm water flows and wash water from clean-up activities contain industrial contaminants.

WaterKeepers conducted an on-site inspection of AIM's facility on August 8, 1999 when photographs were taken. The only other visit to AIM on behalf of WaterKeepers was a subsequent inspection so brief that WaterKeepers' expert, Steven Bond, did not even exit his vehicle. Prior to notifying AIM of its intent to sue, WaterKeepers conducted no testing of water discharged from the AIM facility and further performed no tests on dust or particulate matter allegedly observed by WaterKeepers on the premises. Nonetheless, by letter dated June 28, 2000, WaterKeepers advised AIM that it would commence judicial proceedings against AIM once 60 days had passed. In that letter, WaterKeepers charged AIM with violating the Clean Water Act "each time that you have discharged storm water or wash water contaminated with pollutants."

No specific dates for these alleged violations are set forth in the June 28, 2000 letter. With respect to the contaminated wash water, WaterKeepers makes no attempt whatsoever to list any dates of infraction. As to its charges that AIM discharged polluted storm water, WaterKeepers again provides no dates, stating only that such discharges have

occurred during "at least every rain event over 0.1 inches." To substantiate that claim, WaterKeepers attaches two tables of rain data that it claims are for the Lodi region. One of those tables charts rainfall in Stockton, a city some fifteen miles away from Lodi. The remaining chart measures rainfall at Bear Creek "near" Lodi, and Defendants' notice contains no information concerning how close that is to the AIM facility. In addition, the last recorded data contained in the Bear Creek chart dates from June 4, 1997, some three years before issuance of WaterKeepers' letter. Even prior to that time, the Bear Creek rainfall data was frequently incomplete, with many dates listed as missing any precipitation information whatsoever. Further, comparison of the two charts for recording period that do overlap show sometimes significant differences in precipitation levels on given days,[2] making their applicability to yet another geographic location like the AIM facility even more problematic.

Even aside from the dates purportedly reflected on the precipitation tables, WaterKeepers' June 28, 2000 notice contains the additional sweeping statement that, "whether or not such dates are contained on the rainfall data table," AIM "committed violations of the Act on each and every date on which the rainfall at the Facility exceeded 0.1 inch . . ." Significantly, WaterKeepers' own expert, Steven Bond, admitted at deposition that the premise underlying the 0.1 inch benchmark was incorrect, later stating that 0.19 inches

2. On January 1 and 2, 1997, for example, the Stockton data shows only .80 and .30 inches of rain, respectively, and during the same period the Bear Creek levels are 1.26 and .94 inches.

was more accurate in predicting the likelihood of any contaminated storm runoff.[3]

Prior to receiving WaterKeepers' letter of June 28, 2000, AIM management were unaware of either the requirements of the Clean Water Act or its potential applicability to the AIM facility. Nonetheless, in an effort to avoid threatened litigation, Brown located an environmental engineer, Daniel K. Barber, and proceeded to hire Mr. Brown for purposes of ensuring compliance with the Clean Water Act. Within approximately ten days following receipt of Waterkeeper's letter, AIM submitted a Notice of Intent certification to the State of California signifying its intent to comply with the Clean Water Act. Thereafter, on or about July 21, 2000, a Storm Water Pollution Prevention Plan was submitted, with a copy sent to WaterKeepers. WaterKeepers nonetheless proceeded to file the instant litigation on September 12, 2000.

STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Under summary judgment practice, the moving party

> "always bears the initial responsibility of informing the district court of the basis for its

3. Bond Deposition, Exhibit "B" to the Second Supplemental Declaration of Dennis M. Hauser, 21:19-22:17; see also Declaration of Steven Bond dated May 23, 2002, ¶ 12.

> motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact."

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Rule 56(c)).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-587 (1986); *First Nat'l Bank v. Cities Ser. Co.*, 391 U.S. 253, 288-289 (1968).

In attempting to establish the existence of this factual dispute, the opposing party must tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P. 56(e). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251-52 (1986); *Owens v Local No. 169 Assoc. of Western Pulp and Paper Workers*, 971 F.2d 347, 355 (9th Cir. 1987). Stated another way, "before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the

party producing it, upon whom the onus of proof is imposed." *Anderson*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)). As the Supreme Court explained, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more that simply show that there is some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed, before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987).

ANALYSIS

The purpose of the Clean Water Act, adopted in 1972, is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Section 402(p) of the Act establishes a framework for regulating industrial storm water discharges under the National Pollution Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342(p). States with approved NPDES permit programs are authorized by Section 402 (p) to regulate

industrial storm water discharges through either individual permits or by issuance of a single, statewide general permit applicable to all industrial dischargers. *Id.* In November 1991, the California State Water Resources Control Board issued Water Quality Order No. 91-13-DWQ, which created a statewide general permit program. An industrial facility must either comply with the terms of this Order, as subsequently amended, or obtain an individual NPDES permit before discharging storm water. 33 U.S.C. § 1342.

The Clean Water Act does permit commencement of a citizen suit to enforce its provisions. Section 505(a) of the Act, 33 U.S.C. § 1365(a), provides in pertinent part as follows:

> ". . . any citizen may commence a civil action on his own behalf –
>
> (1) against any person . . . alleged to be in violation of (A) an effluent standard of limitation under this chapter or (B) an order issued by . . . a State with respect to such a standard or limitation."

Before instituting such an action, however, the Act requires a minimum of 60 days written notice of "any standard, limitation or order" violated. 33 U.S.C. § 1365(b)(1)(A). By regulation, the content of this Notice has certain requirements:

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with

> respect thereto, shall include sufficient information to permit the recipient, to identify the specific standard, limitation or order alleged to have constituted a violation, the person or persons responsible for the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a).

In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Supreme Court interpreted a provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972. ("RCRA"), containing a 60 day notice prerequisite similar to that required before commencement of a citizen suit under the Clean Water Act. The Court found that failure to meet the notice requirement required a district court to dismiss a citizen suit as barred by the terms of the statute, stating as follows:

> "[W]e hold that the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion."

Id. at 31.

Appendix B

The Court expressly rejected the suggestion that it apply a "flexible or pragmatic construction" to the citizen suit notice provision:

> The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal steps necessary' to preserve their claims." (citation omitted)

Id. at 27-28.

In *Washington Trout v. McCain Foods*, 45 F.3d 1351, 1352 (9th Cir. 1995), the Ninth Circuit found the logic of Hallstrom to be equally applicable to the notice provision at issue here pursuant to 33 U.S.C. § 1365(b)(1). Consequently, as an initial matter this Court must determine whether the 60-day notice issued by WaterKeepers in this case is jurisdictionally sufficient to permit maintenance of this action in federal court. Defendants contend, inter alia, that the notice is defective because it fails to accurately the state the dates of the alleged discharges in accordance with the terms of the statute and corresponding regulation.

In *California Sportfishing Protection Alliance v. City of West Sacramento*, 905 F.Supp. 792 (E.D. Cal. 1995), the Eastern District considered the sufficiency of plaintiff's Clean Water Act pre-litigation notice in the context of a motion to dismiss brought by the defense. California Sportfishing's 60-day notice advised the City of three specific violations of its NPDES permit occurring on specified dates, and went on to claim that the City had violated said permit "[f]or the

previous five years on hundreds of occasions." Citing the decision in *Washington Trout*, *supra*, the court recognized the strict approach to the notice provision adopted by the Ninth Circuit as most consistent with the purpose and structure of the notice statute and the language of the corresponding regulation. Significantly for purposes of the present matter, the California Sportfishing decision offers the following observation with regard to the specificity required in identifying the date or dates of alleged violations:

> "[T]he date or dates of the violation must be stated with some specificity. Ideally plaintiff will identify the precise date. But at the least plaintiff should give a range as to date that is reasonably limited."

Id. at 799.

Although the Eastern District ultimately found that the notice provided in *California Sportfishing* complied with statutory requirements, it did so because of the three date-specific violations that were alleged. The court did not find sufficient, however, plaintiff's sweeping conclusion that the City had also violated the Clean Water Act on hundreds of occasions over the previous five years, stating that such generalizations do "not give sufficient notice of the date or dates on which the violations are alleged to have occurred." *Id.* at 800.

Unlike *California Sportfishing*, there are no specific violation dates cited in WaterKeepers' notice. WaterKeepers' claim that Defendants violated the Act "each time" they discharged contaminated wash water over the previous eight

year period is just as vague as the language rejected by Judge Levi as insufficient in *California Sportfishing*. Nor does WaterKeepers' reference to incomplete and geographically distinguishable rainfall data make its notice adequate with regard to storm water discharge. Given the Ninth Circuit's strict approach to notice requirements, such references do not give "a range as to date that is reasonably limited" as required by California Sportfishing. Waterkeepers' notice must therefore be found lacking.

More recent Ninth Circuit authority is in accord with this conclusion. In *Friends of Frederick Seig Grove v. Sonoma County Water Agency*, 124 F.Supp.2d 1161 (9th Cir. 2000), the defendants had been subject to four previous enforcement orders involving effluent violations of their NPDES permit during the four month period that preceded plaintiff's notice of intent to file suit under the Clean Water Act. In addition, while plaintiff's notice advised defendants that they had committed violations "on numerous separate occasions from January 1, 1995 to the date of [the] notice," the notice went on to state that these violations were based on review of defendants' own monitoring data submitted by defendants to the Regional Board. While the notice did list 326 separate violations, it failed to specifically identify the dates on which any of the alleged violations occurred.

Citing approvingly the Eastern District's decision in *California Sportfishing*, *supra*, the Ninth Circuit in *Seig Grove* noted that plaintiff could not "simply allege that violations occurred within a broad period of time with no additional information." *Id.* at 1168. While noting that it was a "close call," the court nonetheless found plaintiff's notice

to be sufficient because the violations it identified were based on the defendants' own submissions, in the form of self-monitoring data, to the Regional Board.

In this case we are faced with nothing more that WaterKeeper's bald assertion that violations occurred "each time" wash water was discharged and "on each and every date" that two rainfall data tables (both of which are not site-specific to the AIM facility, with one table being substantially incomplete as well) suggest that precipitation in excess of .10 inch was present. If the circumstances present in *Seig* Grove were a "close call" with respect to the sufficiency of notice, the situation confronted here certainly is not.

Community Assn for Restoration of the Environment v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002), like *Seig Grove*, involved a long history of compliance problems on the part of the defendant. Plaintiff's pre-suit notice of Clean Water Act violations referred to twelve specific violations, enumerated by date and all involving a single drain for discharge of manure waste. Because plaintiff's complaint listed some thirty two additional violations (also involving the same drain in question) that had not been delineated by the notice, defendant argued that plaintiff's notice was insufficient as to those additional violations. Although the *Bosma* court continued to recognize that notice should give a range as to date that is reasonably limited, it nonetheless found that the notice here was sufficiently specific to inform plaintiff as to its purported shortcomings because the violations alleged "originated from the same source, were of the same nature, and were easily identifiable." Here we are

not dealing with infractions originating from a single drain but instead are confronted with a myriad of allegations pertaining both to systemic (pollutants generated by AIM's manufacturing activities themselves), maintenance (the condition of the AIM facility) and structural (berming to direct water flow, for example) issues. In short, the present matter does not involve the same readily ascertainable source of pollution confronted in Bosma,[4] and the rationale for relaxing specific date requirements in light thereof is accordingly not present.

Finally, the Ninth Circuit's even more recent decision in *San Francisco BayKeeper v. Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002) is of no assistance to DeltaKeeper in validating its pre-suit notice. In that case, the defendant owned and operated a petroleum coke storage and loading facility adjacent to the New York Slough, a navigable waterway flowing into the San Francisco Bay. Plaintiff's notice in Tosco alleged that loose coke, stored in large uncovered piles, both spilled during ship loading and was blown by the wind into New York Slough, thereby polluting the water. Plaintiff's notice identified fourteen dates in 1998 when Coast Guard records showed that ships had been docked at defendant's facility. The court, finding that defendant was in a better position than BayKeeper in identifying the precise

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4. According to Defendants, efforts to identify the source of certain pollutants are ongoing. They claim that certain metals detected through testing are not in fact produced by AIM's industrial activities, arguing, for example, that zinc discharges may be generated not by anything pertaining to AIM's manufacturing operations but instead by rainwater dripping from a corrugated chain link fence surrounding the facility.

dates of its own ship loading, held that notice was sufficient as to the alleged loading violations. Here no similar argument can be made that AIM had ready access to information that WaterKeepers did not.

While the Tosco court does state that plaintiff's claim of wind discharge[5] presents a "closer question" in terms of the adequacy of notice, the court nonetheless found that because the uncovered coke piles were so clearly identified as the offending practice, plaintiff's notice was "sufficiently specific" to inform defendant of what it was doing wrong and "specific enough" to give Tosco an opportunity to correct the problem by enclosing or covering the coke piles. *Id.* at 1159.

The case at bar is distinguishable from *Tosco* in this respect in just the same way it differs from *Bosma*. In both Tosco and Bosma the fact that the violation source was so readily identifiable justified some departure from the requirement that specific dates be included within the notice so as to ensure that the defendants understood the allegations levied against them.

Here there is no justification for any such departure because the nature of potential remedial actions to be taken at the AIM facility is by no means as clear.

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5. The notice alleged that wind-blown violations took place "on each day when the wind has been sufficiently strong to blow coke from the piles into the slough." *Id.* at 1158.

Appendix B

CONCLUSION

Based on the foregoing, the Court finds insufficient the 60-day notice required by 33 U.S.C. § 1365 (b) (1) (A) and 40 C.F.R. § 135.3 (a) as a prerequisite to Plaintiff's commencement of the instant litigation. That insufficiency mandates dismissal of this action, and Defendants' motion for summary judgment is accordingly granted. Because the case is consequently disposed of on jurisdictional grounds, the Court need not address the remaining allegations made by Defendants in their motion, or the merits of Plaintiff's motion for summary judgment/summary adjudication of issues. In addition, because the parties' extensive evidentiary objections, as well as Plaintiff's Motion to Strike the Declaration of Daniel K. Barber, raise issues not necessary to the Court's ruling, no ruling is made on those matters either.

IT IS SO ORDERED.

DATED: DEC 3 2002

s/ Morrison C. England
MORRISON C. ENGLAND, Jr.
UNITED STATES DISTRICT JUDGE

(2)

No. 04-468

Supreme Court, U.S.
FILED
DEC 6 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AG INDUSTRIAL MANUFACTURING INC.
and CLAUDE E. BROWN,

Petitioners,

v.

WATERKEEPERS NORTHERN CALIFORNIA,
a non-profit corporation dba DELTAKEEPER,
and BILL JENNINGS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an industrial manufacturer that admits it never made any effort to comply with the Clean Water Act ("CWA") prior to being served with a 60-day notice of intent to sue under CWA section 505, 33 U.S.C. § 1365(b), can defeat subject matter jurisdiction by asserting that it has partially complied with the CWA prior to the commencement of a citizen enforcement action against it.

2. Whether a 60-day notice letter which (a) alleges that an industrial manufacturer has been in daily violation of the CWA due to its conceded failure to prepare and implement specifically identified plans and reports; (b) lists more than 300 specific dates on which the manufacturer allegedly discharged contaminated stormwater in violation of the CWA, and (c) details the specific provisions of the CWA permit that the manufacturer allegedly violated satisfies the CWA's notice requirement, as implemented by 40 C.F.R. § 135.3(a), to provide "sufficient information to permit the recipient to identify the specific standard, limitation or order alleged to have been violated . . . [and] the date or dates of such violation."

RULE 29.6 CORPORATE DISCLOSURE NOTATION

Respondent WaterKeepers Northern California, d/b/a DeltaKeeper, has no parent corporation and there are no companies that hold any stock in Respondent, which is a non-profit corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE NOTATION	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
I. AIM Effectively Concedes that, as of the Filing of the Complaint, It Had Not Come Into Full Compliance With the Act.	3
II. Following a Thorough Investigation, WaterKeepers Sent AIM a Detailed Notice Letter Describing AIM's Alleged Violations.	4
III. In Dismissing WaterKeepers' Complaint for Lack of Subject Matter Jurisdiction, the District Court Expressly Declined to Consider Any of WaterKeepers' Evidence that AIM was in Continuous Violation of the Act.	5

Contents

	Page
REASONS FOR DENYING THE PETITION	7
I. This Court Should Deny Review Because It Already Rejected AIM's Main Contentions in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*	8
II. The Ninth Circuit Properly Recognized That a Defendant Could Deprive the Court of the Power to Hear a Case by Coming into Complete Compliance During the 60-Day Notice Period.	11
III. There Is No Conflict Among the Circuit Courts, and the Ninth Circuit Correctly Applied the CWA's Notice Requirements in This Case.	13
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

American Canoe Association Inc. v. District of Columbia Water and Sewer Authority, 306 F. Supp. 2d 30 (D.D.C. 2004) 17

Atlantic States Legal Foundation Inc. v. Stroh Die Casting Co., 116 F.3d 814 (7th Cir. 1997) 14

Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 14

City of New York v. Anglebrook Ltd Partnership, 891 F. Supp. 900 (1995) 17

Friends of Frederick Seig Grove # 94 v. Sonoma County Water Agency, 124 F. Supp. 2d 1161 (N.D. Cal. 2000) 8

Friends of the Earth v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) 11

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 40 (1987) ..... *passim*

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) 13

Cited Authorities

Page

Mullan v. Torrance,
22 U.S. 537 (1824) 12-13

NRDC v. Southwest Marine, Inc.,
236 F.3d 985 (9th Cir. 2000), *cert. denied*,
533 U.S. 902 (2001) 7, 11, 15, 17

NRDC v. Southwest Marine, Inc.,
945 F. Supp. 1330 (S.D. Cal. 1996), *aff'd*,
236 F.3d 995 (9th Cir. 2000) 8, 16

ONRC Action v. Columbia Plywood, Inc.,
286 F.3d 1137 (9th Cir. 2002) 7

San Francisco BayKeeper v. Tosco Corp.,
309 F.3d 1153 (9th Cir. 2002) 14

Sierra Club v. Union Oil Co. of California,
813 F.2d 1480 (9th Cir.) 4

Steel Co. v. Citizens for a Better Environment,
528 U.S. 83 (1998) 11

FEDERAL STATUTES

33 U.S.C. § 1251 1

33 U.S.C. § 1365(b) ..... i, 14

Cited Authorities

Page

RULES

Federal Rule of Civil Procedure Rule 11 10

Federal Rule of Civil Procedure Rule 12(b) 5

United States Supreme Court Rule 10 7

FEDERAL REGULATIONS

40 C.F.R. § 131.38 4

40 C.F.R. § 135.3(a) ..... i, 14, 16

55 Fed. Reg. 47990 (Nov. 16, 1990) 15

TABLE OF APPENDICES

Page

Appendix A — Memorandum And Order Of The United States District Court For The Eastern District Of California Dated And Filed March 13, 2003 ..... 1a

Appendix B — Notice Of Violations And Intent To File Suit Dated June 28, 2000 ..... 8a

Respondents WaterKeepers Northern California, dba DeltaKeeper, and Bill Jennings ("WaterKeepers") respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's judgment in this case.

OPINIONS BELOW

In addition to the two opinions set forth in the petition for certiorari, the district court also issued an unpublished memorandum and order denying petitioners' motion for attorneys' fees, attached hereto as Appendix A ("App.").

PRELIMINARY STATEMENT

This case does not present any reason, let alone a "compelling reason," for the Court to grant discretionary review. The case law on the issues presented is well-settled, and petitioners concede that there is no inter-circuit conflict. Pet. 20. Indeed, petitioners' first question presented simply rehashes an issue that was definitively resolved by this Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) ("*Gwaltney*"), which held that a defendant's partial compliance with the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA" or "Act"), does not deprive the federal courts of subject matter jurisdiction. Rather, this Court held, such jurisdiction attaches so long as plaintiffs have made "a good-faith allegation of continuous or intermittent violations" that are ongoing when the complaint is filed. *Gwaltney*, 484 U.S. at 64.

WaterKeepers not only made precisely such allegations here, but also presented on summary judgment extensive proof that these violations continued long after the filing of

the complaint. The district court nevertheless refrained from considering this evidence, or the evidence submitted in opposition by petitioners AG Industrial Manufacturing, Inc. and Clause E. Brown (collectively, "AIM"). Accordingly, the required response under *Gwaltney* is to remand the case for resolution of these factual disputes, which is precisely what the Ninth Circuit did here.

AIM's second question presented is too convoluted to parse with any certainty, but appears to be primarily directed at whether WaterKeepers' notice letter satisfies the CWA's straightforward notice requirements. Applying the same "strict construction" standard as its sister circuits, the Ninth Circuit properly upheld WaterKeepers' notice letter, which provides more detailed information about AIM's alleged violations than any other CWA notice discussed in any published decision. Moreover, AIM's arguments are founded on a host of disputed, and in many cases spurious, factual assertions. Because neither court below reached these disputes, there is no reason why this Court should do so in the first instance.

STATEMENT OF THE CASE

WaterKeepers presents the following Statement of the Case to supplement and correct the mischaracterizations in AIM's statement.

I. AIM Effectively Concedes that, as of the Filing of the Complaint, It Had Not Come Into Full Compliance With the Act.

AIM expressly acknowledges that it operated the subject industrial manufacturing facility ("Facility") for more than two decades without taking any steps to comply with the CWA or the "General Permit" issued by the State of California to cover operations such as the Facility. Pet. 5. AIM also implicitly concedes that, by the filing of the complaint, it had at best only come into partial compliance with the Act. Indeed, rather than claiming outright that it had eliminated all of its alleged violations, the strongest assertion AIM can muster is that, by the time of the complaint, it "had *initiated* compliance efforts." Pet. 20 (emphasis added).

In any event, AIM's own pollution prevention plans and self-monitoring reports document that its "initial efforts" did not succeed in eliminating all violations alleged by WaterKeepers. For instance, shortly before the expiration of the 60-day notice period, AIM prepared its first Storm Water Pollution Prevention Plan ("SWPPP"), in purported compliance with the General Permit. In September 2001, more than a year after WaterKeepers filed the instant action, AIM prepared a substantially revised SWPPP, which purported to correct numerous legal inadequacies WaterKeepers had identified in AIM's initial SWPPP. *See, e.g.*, WaterKeepers' Supplemental Excerpts of Record in Case No. 03-15631 ("SER") at 15-18.

AIM's revised SWPPP identifies the following as materials at the Facility that may contribute pollutants to storm water run-off: acids, batteries, paints, anti-freeze, solvents and dissolved metal sources, the latter including such

heavy metals as lead, zinc, copper, iron, nickel cadmium, antimony, and chromium. Critically, AIM's limited post-complaint monitoring and sampling of its discharges—conducted in response to WaterKeepers' notice—reveal that the Facility discharged aluminum, copper, iron, lead, and zinc in excess of both the "California Toxics Rule," 40 C.F.R. § 131.38, and the "benchmark values" established by the U.S. Environmental Protection Agency ("EPA") for use in evaluating CWA compliance. As AIM acknowledged, its own reports also "recorded visual observations of cloudy discharges with a sheen on three out of five occasions in 2001." SER 15; *see also* SER 13, 20-21.

The merits of this case are, of course, not before the Court. Nevertheless, in light of AIM's unsupportable assertions regarding WaterKeepers' asserted lack of good faith in bringing suit, WaterKeepers must note that the violations recorded in AIM's self-monitoring reports—standing alone—constitute *conclusive* proof of CWA violations.[1]

II. Following a Thorough Investigation, WaterKeepers Sent AIM a Detailed Notice Letter Describing AIM's Alleged Violations.

Commencing in 1999, WaterKeepers' staff, expert consultant, and attorneys conducted a thorough pre-notice investigation of the Facility to determine whether AIM was

1. *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1490-91 (9th Cir. 1987), *vacated for reconsideration*, 485 U.S. 931, *reinstated and amended*, 853 F.2d 667 (9th Cir. 1988); *see also Gwaltney*, 484 U.S. at 53 (noting that Gwaltney's "violations are chronicled in the Discharge Monitoring Reports that the permit required petitioner to maintain").

violating the Act. In good faith reliance on that investigation, WaterKeepers sent AIM and the relevant government agencies its 60-day notice on June 28, 2000. (A copy of this notice is attached hereto as Appendix B. *See* App. 8a.)

In response to the notice, AIM filed its notice of intent ("NOI") seeking coverage under the General Permit on July 7, 2000, and about a month later prepared its first ever SWPPP and storm water monitoring plan. WaterKeepers carefully reviewed this SWPPP and, based on its extensive experience in assessing the adequacy of such documents, concluded that the SWPPP was inadequate. Accordingly, on September 12, 2000, WaterKeepers filed its complaint, alleging the same categories of violations as it had detailed in its notice.

III. In Dismissing WaterKeepers' Complaint for Lack of Subject Matter Jurisdiction, the District Court Expressly Declined to Consider Any of WaterKeepers' Evidence that AIM was in Continuous Violation of the Act.

Because an adequate notice letter is a mandatory prerequisite to the maintenance of a citizen enforcement action, challenges to such notice letters are often brought at the commencement of the litigation as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b). AIM never brought such a motion. Instead, after 18 months of intensive discovery, AIM raised the adequacy of portions of the notice almost as an afterthought in its opposition to WaterKeepers' summary judgment motion. AIM dedicated roughly three pages in its 44-page brief to arguing that the notice was insufficient with respect to just one of WaterKeepers' five causes of action. SER 95-97.

Roughly six months later, the district court took the parties' cross-motions for summary judgment, as well as their extensive evidentiary objections, under submission without oral argument and dismissed WaterKeepers' entire complaint for lack of subject matter jurisdiction. "Because the case is consequently disposed of on jurisdictional grounds," the court held, it "need not address the remaining allegations made by Defendants in their motion, or the merits of Plaintiff[s'] motion for summary judgment/summary adjudication of issues." Pet. App. 34a. As the Ninth Circuit observed, the district court based its dismissal "solely on the basis of WaterKeepers' allegation regarding storm-water discharges," Pet. App. 9a, and thus never addressed the adequacy of WaterKeepers' notice with respect to its other four causes of action.

Following entry of judgment, AIM filed a motion for attorneys' fees, contending that WaterKeepers' complaint was "frivolous" and not brought in "good faith." The district court denied AIM's motion. App. 1a. "The fact that this Court found Plaintiffs' pre-suit notice to be inadequate," the Court held, "does not mean that the underlying suit was itself frivolous. Indeed, because this Court ruled only on the adequacy of such notice and did not reach the merits of Plaintiffs' claims, AIM cannot realistically contend that the Court found the action 'groundless' as opposed to procedurally defective." App. 4a.

REASONS FOR DENYING THE PETITION

AIM does not even attempt to identify any provision of Supreme Court Rule 10 that would warrant review by this Court. Instead, it claims that "review is warranted to avoid unnecessary exhaustion of judicial resources and encourage voluntary compliance with the Act." Pet. 12. What AIM fails to acknowledge, however, is that this Court in *Gwaltney* definitively resolved the main issues presented.

As for AIM's asserted concern about avoiding unnecessary litigation, the holding that AIM attacks is not the opinion below, but the Ninth Circuit's four-year old decision in *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000) ("*Southwest Marine II*"), *cert. denied*, 533 U.S. 902 (2001). Pet. 12-14. There is even less reason for this Court to grant certiorari to review *Southwest Marine II* today than when it declined to do so three years ago. (Whether through inadvertence or otherwise, AIM fails to disclose this Court's denial of certiorari in any of its numerous citations to *Southwest Marine II*). Indeed, as AIM acknowledges, no court in any circuit has disagreed with that holding in the intervening years. Pet. 20. Moreover, contrary to AIM's vague assertion that *Southwest Marine II* somehow rendered the CWA's notice requirements toothless, the courts within the Ninth Circuit—including two Ninth Circuit panels applying *Southwest Marine II*—have continued to dismiss Clean Water Act claims where the notice letter failed to comply with the statutory requirements.[2]

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2. *See, e.g., ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143 (9th Cir. 2002) ("We conclude that the ONRC's 60-day citizen suit notice was not sufficient to alert a reasonable defendant to the two Clean Water Act claims dismissed by the district court"); (Cont'd)

I. This Court Should Deny Review Because It Already Rejected AIM's Main Contentions in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*

In its first question presented, AIM suggests that a CWA defendant can defeat subject matter jurisdiction and standing by asserting that it has come into partial compliance between receipt of a 60-day notice letter and the filing of the plaintiff's complaint. This Court's *Gwaltney* decision squarely forecloses any such argument.

Gwaltney concerned an industrial defendant that, like AIM here, was indisputably in violation of the Act at the time the notice letter was sent. 484 U.S. at 53-55. Unlike AIM, however, Gwaltney also submitted demonstrative evidence in support of its contention that it had *fully complied* with the Act prior to the filing of the complaint. *Id.* at 55 ("Gwaltney contended that [] its last recorded violation occurred several weeks before respondents filed their complaint").

On certiorari, this Court first held that the CWA does not confer jurisdiction over citizen suits for "wholly past

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(Cont'd)
Friends of Frederick Seig Grove # 94 v. Sonoma County Water Agency, 124 F.Supp.2d 1161, 1169 (N.D. Cal. 2000) (granting defendants' motion to dismiss as to CWA violations for which "plaintiff's notice does not provide the defendants with enough information to identify the dates of those unreported violations"); *see id.* at 1168 (adopting standard set forth in *NRDC v. Southwest Marine, Inc.*, 945 F.Supp. 1330, 1333 (S.D. Cal. 1996) ("*Southwest Marine I*"), *aff'd Southwest Marine II*, 236 F.3d 985). And, of course, the Ninth Circuit in the instant case dismissed the claim for which it found that WaterKeepers gave inadequate notice. Pet. App. 14a n.6.

violations." *Id.* at 64; *see also id.* at 60 ("[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into *complete* compliance with the Act and thus likewise render unnecessary a citizen suit") (emphasis added). The Court then addressed the impact on jurisdiction of a factual dispute as to whether a defendant had come into complete compliance with the Act prior to the complaint:

> Petitioner argues that citizen-plaintiffs must prove their allegations of ongoing noncompliance before jurisdiction attaches under § 505. [citation] We cannot agree. The statute does not require that a defendant "be in violation" of the Act at the commencement of the suit; rather, the statute requires that a defendant be "*alleged* to be in violation." Petitioner's construction of the Act reads the word 'alleged' out of § 505.

Id. at 64 (emphasis in original). In other words, this Court explained, CWA section "505 confers jurisdiction over citizen suits when the citizen-plaintiffs make a good faith allegation of continuous or intermittent violation" that is ongoing at the time of the complaint. *Id.*

WaterKeepers readily satisfies this test. First, it is undisputed that WaterKeepers alleged numerous CWA violations that were continuous and ongoing at the time of the complaint.[3] Pet. App. 16a & n.7; Complaint ¶¶ 45-51,

3. To be sure, AIM does assert that WaterKeepers' allegations were not made in "good faith." On that basis, AIM suggests that Supreme Court review at this juncture—rather than a Rule 11 motion before the district court—is necessary to determine whether WaterKeepers' allegations were in fact well grounded. As this Court (Cont'd)

59, 63, 68, 72. Second, while AIM refers to steps it assertedly took to "initiate[] compliance," it has never even attempted to document that it was in *full* compliance with the Act at the time the Complaint was filed.

Third, and perhaps most importantly, WaterKeepers has submitted extensive evidence, *never reviewed by the district court*, documenting both that its allegations were in good faith and that AIM continued to violate the Act for at least 18 months after the complaint. The Ninth Circuit properly remanded the case so that this evidence may be considered. Pet. App. 18a. By contrast, in *Gwaltney*, the stated purpose of the remand was solely to determine whether plaintiffs *allegations* of ongoing violations were made in good faith. *Gwaltney*, 484 U.S. at 64-65, 67; *see id.* at 55 (following summary judgment and a trial, the district court had not found any violations by Gwaltney that post-dated the complaint).

(Cont'd)
expressly held in *Gwaltney*, however, "Rule 11 of the Federal Rules of Civil Procedure, which requires pleadings to be based on good-faith belief . . . *adequately protects* defendants from frivolous allegations." 484 U.S. at 65 (emphasis added). AIM never sought relief below pursuant Rule 11. To the contrary, while AIM's counsel did threaten to move for Rule 11 sanctions based on a threatened motion to dismiss, it decided not to bring either such motion after WaterKeepers' trial counsel pointed out that doing so could subject AIM itself to sanctions. *See* SER 129.

II. The Ninth Circuit Properly Recognized That a Defendant Could Deprive the Court of the Power to Hear a Case by Coming into Complete Compliance During the 60-Day Notice Period.

AIM faults WaterKeepers for purportedly arguing that "it is irrelevant to the issue of subject matter jurisdiction and standing what steps AIM had taken to get into compliance with the Act before the respondents filed their Complaint." Pet. 8; *see also id.* at 16-20 (arguing that this is the necessary import of the *Southwest Marine II* ruling followed by the Ninth Circuit in this case).[4]

In reality, WaterKeepers argues no such thing. To the contrary, WaterKeepers freely acknowledges that a CWA plaintiff would have no standing where a defendant has indisputably come into complete compliance, and

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4. AIM also vaguely asserts that the opinion below somehow conflicts with this Court's holding in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). Pet. 10, 18-19. In *Steel Co.*, this Court held that an environmental group had no standing to pursue claims against a company under the Emergency Planning and Community Right-to-Know Act, where that company demonstrated that it had cured *all* of the alleged reporting violations by the time of the complaint. *Id.* at 105-06 (explaining that the plaintiff therefore failed to satisfy the redressability prong of Article III standing). The Court emphasized, however, that its holding does not apply where, as here, a plaintiff alleges continuing violations. *Id.* at 108 ("If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm"); *see also Friends of the Earth v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 188 (2000) (holding that a citizen alleging ongoing CWA violations satisfies redressability prong of standing); Pet. App. 16a n.7 (noting that "WaterKeepers' complaint alleges continuing and recurring violations of the Act").

eliminated any reasonable likelihood of the alleged violations recurring, prior to the filing of the complaint. Because a plaintiff in that situation also could not allege in good faith that the defendant was committing ongoing violations, there would be no subject matter jurisdiction. *See Gwaltney*, 484 U.S. at 56-63.

Likewise, the Ninth Circuit below expressly recognized, and applied, *Gwaltney's* holding "that citizen plaintiffs may not sue to remedy 'wholly past' violations of the [CWA, because] the Act confers jurisdiction only over suits that allege continuous or intermittent violations." Pet. App. 16a (citing *Gwaltney*). However, the Ninth Circuit also correctly noted that such a situation is not present in this case. *Id.* Rather, the question here is whether AIM's subsequent efforts to come into partial compliance somehow rendered WaterKeepers' notice letter defective, thereby requiring WaterKeepers to send a new notice letter—and wait another 60 days—before it could file suit. Observing that it would have been literally impossible for WaterKeepers to refer to AIM's subsequent compliance efforts at the time it served its 60-day notice, the Ninth Circuit unsurprisingly "h[e]ld that WaterKeepers was not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [AIM's] post-notice compliance efforts." *Id.* at 15a.

Contrary to AIM's unsupported assertion, the Ninth Circuit's holding does not remotely implicate the time-tested principle that subject matter jurisdiction "depends on the state of things at the time of the action brought." Pet. 16-17. The cases cited by AIM for this point simply confirm that subject matter jurisdiction, once established, "cannot be ousted by subsequent [i.e., post-complaint] events." *Mullan*

v. Torrance, 22 U.S. 537, 539 (1824) (diversity jurisdiction not divested by a party's post-complaint change in residence). Here, "at the time of the action brought," WaterKeepers had submitted a notice letter that complied with all statutory and regulatory requirements. As both a factual and a legal matter, AIM's later changes to its plans could not possibly affect whether these conditions precedent had been satisfied. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (construing analogous notice provisions of the Resource Conservation and Recovery Act as "mandatory conditions precedent to commencing suit").

III. There Is No Conflict Among the Circuit Courts, and the Ninth Circuit Correctly Applied the CWA's Notice Requirements in This Case.

As AIM concedes, there is no conflict among the courts regarding the issues presented in this case. Pet. 20. For that reason alone, this Court should deny review. Moreover, the Ninth Circuit properly stated and applied the CWA's notice requirements here. The statutory requirements themselves are brief and straightforward:

> No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . .

33 U.S.C. § 1365(b). The EPA regulations promulgated to implement the CWA are likewise straightforward, providing, in relevant part, that "[n]otice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include *sufficient information to permit the recipient* to identify the specific standard, limitation, or order alleged to have been violated . . . [and] the date or dates of such violation . . . ." 40 C.F.R. § 135.3(a) (emphasis added).

The Ninth Circuit correctly quoted this provision, properly observed that the CWA's notice requirements must be "strictly construed," and then proceeded to determine whether all statutory and regulatory requirements had been met. Pet. App. 6a-11a. In determining how specific notice must be to satisfy 40 C.F.R. § 135.3's mandate that it "include sufficient information to permit the recipient to identify the" alleged violations, the Ninth Circuit followed the Second and Seventh Circuits, as well as its own prior precedents, explaining that "[n]otice is sufficient if it is reasonably specific and if it gives 'the accused company the opportunity to correct the problem.'" Pet. App. 7a (quoting *San Francisco BayKeeper v. Tosco Corp.*, 309 F.3d 1153, 1158 (9th Cir. 2002), *cert. dismissed*, 539 U.S. 924 (2003), and *Atlantic States Legal Found. Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997)); *see also Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 488 (2d Cir. 2001) (same).

Here, there is no doubt that WaterKeepers' notice was specific enough to inform AIM what it was doing wrong. Indeed, AIM acknowledges that the notice prompted it to attempt to correct the violations detailed in the notice. Pet. 5 & n.1; *see also Atlantic States*, 116 F.3d at 820 (defendant's attempted corrective actions in response to

notice letter shows that notice provided sufficient information to permit the recipient to identify the problem); *Southwest Marine II*, 236 F.3d at 997 (same). Moreover, the Ninth Circuit carefully considered, and rejected, each of AIM's rambling arguments as to why the notice letter's pages of detailed information about the alleged violations were somehow insufficiently specific. Pet. App. 11a-17a; *see* App. 13a-23a.

AIM also faults the Ninth Circuit for purportedly adopting in *Southwest Marine II* a "rule that whenever the alleged violation is continuous and ongoing the dates of violation either need not be stated or are presumptively known to the defendant." Pet. 15. The Ninth Circuit has neither adopted nor applied such a rule. And the notice letter in this case identifies the precise dates of AIM's alleged violations.

Specifically, with respect to stormwater discharges, the notice letter states that "you have discharged storm water containing pollutants . . . on each and every date which Attachment A indicates the rainfall at the Facility exceeded 0.1 inch . . ."[5] App. 14a-15a. The referenced attachment lists more than 300 such dates. *Id.* at 27a-29a. This listing of the specific dates of alleged violations, by definition, satisfies the regulatory requirement to provide "sufficient information to permit the recipient to identify . . . the date or dates of

5. The genesis of the 0.1 inch standard used in this and other notice letters is EPA's Industrial Storm Water Permit Final Rule. *See* 55 Fed. Reg. 47990-01, 48018 (Nov. 16, 1990) ("The definition of a 0.1 inch minimum was determined by [studies] to be the minimum rainfall depth capable of producing the rainfall/runoff characteristics necessary to generate a sufficient volume of runoff for meaningful sample analysis.").

such [alleged] violations." *See* 40 C.F.R. § 135.3(a). AIM's criticism of the asserted lack of proof to support these allegations improperly conflates the showing required to prevail on the merits with the allegations necessary to provide adequate notice. Pet. App. 10a, 16a-17a; *see Gwaltney*, 484 U.S. at 64-65.

Similarly, with respect to AIM's alleged failure to prepare and implement an adequate SWPPP, failure to comply with the General Permit's monitoring and reporting requirements, failure to implement best available technology, and failure to file a valid NOI to obtain coverage under the General Permit,[6] the notice alleged the precise dates of the alleged violations, namely: each and every day since the General Permit became effective in 1992. App.18a ("[Y]ou have been in daily and continuous violation of the requirement to develop and implement an adequate SWPPP for the facility on each and every day since October 1, 1992 and will continue to be in violation every day that you fail to develop and implement an adequate SWPPP."); *id.* at 19a-22a (same remaining alleged violations). As the lower courts have uniformly held, the failure to obtain a required permit or implement an adequate SWPPP is a daily ongoing violation; specifying the period of time during which this daily violation occurs thus satisfies the CWA's requirement to identify the dates of the alleged violation. *See, e.g., Southwest Marine I*, 945 F. Supp. at 1333 ("[T]he deficiencies in these plans are ongoing, so there is no specific date that can be alleged as the date of the violation. As long as Southwest operates

6. After filing the complaint, WaterKeepers learned through discovery that the NOI AIM filed during the notice period was in fact valid. Accordingly, WaterKeepers did not pursue this claimed violation below.

without a legally adequate BMP, SWPPP, or monitoring and reporting plan, the violations will continue each and every day."); *Southwest Marine II*, 236 F.3d at 996 (same); *American Canoe Ass'n Inc. v. District of Columbia Water and Sewer Authority*, 306 F.Supp.2d 30, 35-36 (D.D.C. 2004) ("Reference to ongoing violations is sufficiently specific notice.") (citing *Southwest Marine II*); *City of New York v. Anglebrook Ltd P'ship*, 891 F.Supp. 900, 906 (S.D. N.Y. 1995) ("[N]otice of a flawed SWPPP is notice of an ongoing violation").

CONCLUSION

For the reasons stated above, the Court should deny AIM's petition for certiorari.

Respectfully submitted,

ROBERT S. PERLMUTTER
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Counsel for Respondents

December 6, 2004

APPENDIX A — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED AND FILED MARCH 13, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CIV. S00 -1967 MCE PAN

WATERKEEPERS NORTHERN CALIFORNIA,
a non- profit corporation, doing business as DELTAKEEPER,
and BILL JENNINGS, an individual;

Plaintiffs,

v.

AG INDUSTRIAL MANUFACTURING, INC.,
a corporation; and CLAUDE E. BROWN, an individual;

Defendants.

MEMORANDUM AND ORDER

In this action for violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (hereinafter referred to as the "Clear Water Act"), Plaintiffs alleged that Defendants AG Industrial Manufacturing, Inc. and its president, Claude E. Brown (collectively "AIM") have repeatedly discharged industrial pollution into the Mokelumne River and the San Joaquin River Delta since at least 1992. On December 3, 2002, this Court granted summary judgment in favor of AIM on grounds that Plaintiffs

failed to file adequate notice of their intent to sue AIM as required by the Clean Water Act at 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3(a). The Court determined that because of the inadequacy of Plaintiff's pre-suit notice, it was without jurisdiction to hear the case.

AIM now seeks to recover attorney's fees in the amount of $126,293.00 as well as costs incurred for reasonable expert witness fees in the total sum of $15,034.00.[1] In addition, AIM previously filed a Bill of Costs in the amount of $13,685.56 seeking recovery for additional expenses under Local Rule 54-292 and 28 U.S.C. § 1920. The Court rules on both these matters below.

ANALYSIS

A. AIM's Motion for Attorney's Fees and Expert Witness Costs

The Clean Water Act provides that the court can award costs of litigation, including reasonable attorney and expert witness fees, to any prevailing or substantially prevailing party whenever it determines that such an award is appropriate. 33 U.S.C. § 1365(d).

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1. As requested by AIM, judicial notice it taken of all pleadings and files in the above-referenced action. The Court also takes judicial notice of the Northern District's Order Denying Motion to Dismiss in San Francisco BayKeeper v. Tosco Corp. No. C00-0256, pursuant to Federal Rule of Evidence 201(b). The Court declines to rule on AIM's evidentiary objections to the Declaration of Shana Lazerow because the matters at issue therein were not necessary to the Court's decision on this motion.

Appendix A

Although it is beyond dispute that AIM prevailed in this case by obtaining summary judgment, that fact alone is not determinative in awarding fees to AIM as a successful Clean Water Act defendant. Instead, such an award to a prevailing defendant is appropriate only where the plaintiff's action was "frivolous, unreasonable, or without foundation." *Razore v. Tulalip Tribes*, 66 F.3d 236, 240 (9th Cir. 1995) (holding that the frivolousness standard set forth by the Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421-22 (1978), as the benchmark for awarding fees in a Title VII case, also governs fee requests by defendants under the Clean Water Act); *Morris-Smith v. Moulton Niguel Water District*, 44 F.Supp.2d 1084,1086 (C.D. Cal. 1999), *aff'd*, 234 F.3d 1277 (9th Cir. 2000) (also applying so-called *Christiansburg* standard in assessing fee award to prevailing defendant in Clean Water Act case).

Under the *Christiansburg* standard, the terms "frivolous," "unreasonable" and "without foundation" are essentially interchangeable. *Thomas v. Bible*, 983 F.2d 152, 154, n. 2 (9th Cir. 1993). A case is "frivolous" when it is "groundless . . . with little prospect of success." *United States v. Manchester Farming Partnership*, 315 F.3d 1176, 1183 (9th Cir. 2003) . "The plaintiff's action must be meritless in the sense that it is groundless or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980); *Christiansburg*, 434 U.S. at 421 (defining "meritless" as meaning "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case.")

The fact that this Court found Plaintiffs' pre-suit notice to be inadequate does not mean that the underlying suit was itself frivolous. Indeed, because this Court ruled only on the adequacy of such notice and did not reach the merits of Plaintiffs' claims, AIM cannot realistically contend that the Court found the action "groundless" as opposed to procedurally defective. Given the posture at which the case was decided, the Court declines to make any determination as to the substantive merits of Plaintiffs' claims, let alone a finding that Plaintiffs' entire case was groundless so as to justify an award of attorney's fees and expert witness costs against Plaintiffs under 33 U.S.C. § 1365(d). Therefore AIM's request for such fees is denied.

B. AIM's Bill of Costs.

In addition to claiming entitlement to attorney's fees and expert witness costs, AIM has also submitted a Bill of Costs totaling $13,685.56 for other allegedly recoverable items under Local Rule 54-292 and 28 U.S.C. § 1920. Certain of the items claimed, however, are not properly taxed. AIM argues entitlement to $3,466.00 for witness fees incurred in producing its expert, Steven Bond, for deposition. Expert witness fees, however, may be taxed only where the expert is appointed by the court; such fees are otherwise limited to $40 per diem as set forth in 28 U.S.C. § 1821. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Because no such appointment was made here, AIM's recovery for Mr. Bond's expenses is limited to the per diem and mileage fees enumerated in § 1821. AIM has not disputed Plaintiffs' estimate of those fees at $266.

Plaintiff's claimed costs for court reporter fees must also be reduced to $3,439.93 given the fact that $100 of the total amount claimed was for a full day appearance fee rather than a recoverable-transcript charge. "[C]osts incident to the depositions, namely the court reporter's "per diem" charge . . . must be disallowed because § 1920(2) does not provide for taxation of those items." *Viacao Aerea Sao Paulo, S.A. v. Int'l Lease Finance Corp.*, 119 F. R. D. 435, 439 (C.D. Cal. 1998).

In addition, while Plaintiffs seek recovery of $3,019.94 in copying charges, such expenses are recoverable only for copies "necessarily obtained for use in the case." 28 U.S.C. § 1920(4). Although the Court is well aware of the volume of paper generated by this case, AIM has not otherwise demonstrated that the charges claimed were indeed necessary. Furthermore, with respect to the $2,81.05 sought for "copies done in office", at a reasonable rate of $.08 per page, 35,638 copies would have been made. This figure appears excessive and mandates reduction. After exercising its discretion, the Court believes that only half of the total amount claimed by AIM for copying charges was reasonably necessary. AIM is accordingly entitled to $1,509.97 for such charges.

Although AIM is entitled to recover clerk's fees as a recoverable costs under both Local Rule 54-292 and 28 U.S.C. § 1920(1), no substantiation for the $200 in claimed costs in that regard has been provided. The Court is unaware of any clerk's fees payable by a defendant like AIM of that magnitude. Consequently the clerk's fees sought by AIM are disallowed.

With respect to the last major area of challenged costs,[2] AIM contends in the catch-all "other costs" category that various items of overhead, including unspecified mileage, postage, phone and facsimile charges, and charges for computerized legal research at Westlaw, are recoverable. These items are not authorized by 28 U.S.C. § 1920 and do not constitute taxable costs. Finally, while the "other costs" category also includes $820 for preparation of financial statements and an unspecified charge of $101.25 for DLR Legal Services, no showing has been made that either of those items are properly compensable. With specific reference to the claimed financial statement charges, time spent on research and analysis by both expert and non-expert witnesses in preparing exhibits is not recoverable. *Romero v. City of Pomona*, 883 F. 2d 1418, 1428 (9th Cir. 1998).

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2. The Court also rejects an additional argument asserted by Plaintiffs to the effect that the testimony of one Christopher D'Ovidio was not necessary and that the $187.75 transcript cost associated with Mr. D'Ovidio's deposition should be disallowed.

Appendix A

CONCLUSION

AIM's recoverable costs under Local Rule 54-292 and 28 U.S.C. § 1920 must be reduced from $13,687.56 to $5,215.90. AIM's Motion for Attorney's Fees and Expert Witness Costs is denied.

IT IS SO ORDERED.

DATED: MAR 13 2003

s/ Morrison C. England, Jr.
MORRISON C. ENGLAND, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B — NOTICE OF VIOLATIONS AND INTENT TO FILE SUIT DATED JUNE 28, 2000

WaterKeepers

June 28, 2000

VIA CERTIFIED MAIL

Claude E. Brown, President
AG Industrial Manufacturing, Inc.
110 S. Beckman Rd.
Lodi, CA 95240

AG Industrial Manufacturing, Inc.
c/o Marilyn H. Brown, Registered Agent
110 S. Beckman Rd.
Lodi, CA 95240

Re: Notice of Violations and Intent to File Suit.

Dear Ag Industrial Manufacturing, Inc.
and Mr. Claude E. Brown:

I am writing to you on behalf of DeltaKeeper and Bill Jennings, to give you notice that DeltaKeeper and Bill Jennings (hereinafter collectively "DeltaKeeper") intend to file a civil action against Ag Industrial Manufacturing, Inc. and Mr. Claude E. Brown ("you") 60 days after the date of this letter, for your violations of the Clean Water Act. DeltaKeeper is an organization dedicated to the protection and enhancement of the water quality, ecosystems and natural communities of the Sacramento-San Joaquin River Delta. DeltaKeeper is a project of WaterKeepers Northern California. Bill Jennings is both the director and a member of DeltaKeeper.

Appendix B

A. BACKGROUND

The Mokelumne River is tributary to the San Joaquin River and Sacramento-San Joaquin Delta. The water quality of the Mokelumne and San Joaquin Rivers and Delta is in serious decline. Most Central Valley waterways, including the Mokelumne and San Joaquin Rivers and Delta, have been formally designated as "impaired" water bodies pursuant to Section 303(d) of the federal Water Pollution Control Act ("Clean Water Act") by the State Water Resources Control Board ("State Board") and the United States Environmental Protection Agency. The entire Delta is designated pursuant to California's Bay Protection and Toxic Cleanup Program as a Toxic Hot Spot because of mercury and pesticides. The United States Geological Survey recently concluded in a national assessment of water quality that the San Joaquin River basin (including the Delta) is one of the most degraded and polluted basins in the entire country.

The California Department of Health Services has issued a Delta-wide fish consumption health advisory because of excessive mercury levels in fish tissue. Data recently collected by the San Francisco Estuary Institute demonstrate that fish commonly caught in the Mokelumne River and Delta contain elevated and unsafe concentrations of a number of contaminates. Last year, water samples collected from the lower Mokelumne by DeltaKeeper and sent to the University of California Davis Aquatic Toxicology Laboratory for bioassays and chemical analysis were found to be acutely toxic to aquatic life. Further, data gathered by CalFed, a coalition of 15 state and federal agencies committed to Delta restoration, has confirmed that the Delta and its tributaries are heavily polluted waterbodies.

Appendix B

One significant cause of this decline in water quality is the unlawful discharge of storm water associated with industrial activities. With every rainfall event, an enormous quantity of polluted rainwater originating from industrial facilities pours into the Mokelumne River and subsequently flows into the San Joaquin River and Delta and ultimately into the San Francisco Bay. In the City of Lodi, completely untreated storm water flows through the storm drain system directly to the Mokelumne River and other tributaries to the Delta. The State of California's General Permit for industrial storm water discharges, established pursuant to the Clean Water Act, requires dischargers to address these issues. However, as of the date of this letter, more than seven years after this General Permit was issued, very few industrial facilities in the Lodi municipal area are in compliance with the General Permit.

DeltaKeeper has conducted extensive investigations and studies that document non-compliance with storm water regulations. Given the results of these investigations, DeltaKeeper believes that the time has come for all members of the community -- citizens, regulated dischargers, elected officials, public agencies, and scientists alike -- to work together to resolve this serious water quality problem.

DeltaKeeper's investigations have uncovered significant violations of storm water regulations at your facility. Consequently, you are hereby placed on formal notice from DeltaKeeper[1] that, after the expiration of sixty (60) days from

1. Both DeltaKeeper through its parent organization WaterKeepers Northern California and Bill Jennings provide this NOTICE OF VIOLATION AND INTENT TO SUE and intend to sue you for your violations.

the date of this Notice of Violation and Intent To Sue, DeltaKeeper intends to file suit in Federal Court against you under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), for violations of the Act. These violations are described more fully below.

B. THE LOCATION OF THE ALLEGED VIOLATIONS

The violations alleged in this notice letter have occurred and continue to occur at the agricultural machinery and equipment manufacturing facility owned and/or operated by you and located at 110 South Beckman Road, Lodi, San Joaquin County, California 95240 (hereinafter, the "Facility"). The Facility discharges its contaminated storm water and makes non-storm water discharges to the city storm sewer system, which leads to the Mokelumne River and ultimately to the Delta.

C. THE ACTIVITIES AT THE FACILITY ALLEGED TO CONSTITUTE VIOLATIONS

You are discharging storm water contaminated with pollutants as well as storm water associated with industrial activities from the Facility to waters of the United States. In addition, you are discharging non-storm water pollutants. DeltaKeeper believes you have discharged and continue to discharge numerous industrial pollutants associated with the Facility's operations. These pollutants include, but are not limited to, petroleum fuels; oil and grease; metals such as lead, iron, zinc, aluminum, arsenic, cadmium, and chromium; solvents and other compounds such as benzene and toluene; as well as other pollutants that cause excursions from water quality standards for COD, BOD, TSS, and pH.

Appendix B

The industrial activities at the site include the manufacture and repair of machinery, the storage, maintenance, and cleaning of the equipment used to make the machinery, and the handling, processing, and storage of various materials used in the manufacturing process including scrap metal and old machinery parts. Numerous activities at the site take place outside and are exposed to rainfall. These activities include: the grinding, cutting, welding, machining and painting of metal; the storage of raw materials, manufactured and repaired products, and equipment used in the manufacture and repair processes; the storage and use of vehicles and equipment for materials handling; and the storage, handling, and disposal of waste materials. The Facility's activities generate soot, metal shavings, filings, fines, and spills of chemicals such as oil, grease and solvents. Materials stored at the Facility are commonly stored in open and deteriorated containers. The Facility property is covered by debris, scrap, rusting metal objects, trash, machinery in various states of disrepair, used, oily and rusting equipment and machinery parts, tanks, open drums and barrels, old tires, and wood pallets. There are visible stains from spilled or leaked oil and grease or other chemicals on the pavement throughout the Facility. In addition, many of the surfaces around the facility are covered in metal shavings, filings, fines, and black soot that are the result of cutting and welding.

Your management practices at the Facility are wholly inadequate to prevent the sources of contamination described above from causing the discharge of pollutants to waters of the United States. The Facility lacks essential structural controls such as grading, berming and roofing to prevent rainfall and storm water flows and wash water from coming

into contact with these and other sources of contaminants. The Facility lacks structural controls to prevent the discharge of contaminated water. The Facility lacks an adequate system, such as a filtration system, to treat contaminated water. Periodically you wash or hose down areas of the facility or dirty machinery and equipment. At these times contaminants present in the area are carried off by the wash water and flushed into the storm sewer system.

Additional activities, which are alleged to constitute violations, are described in the sections below.

D. THE STANDARDS, LIMITATIONS, AND/OR ORDERS ALLEGED TO HAVE BEEN VIOLATED

1. Discharges in Violation of the Clean Water Act.

You have violated the Clean Water Act[2] by discharging pollutants to waters of the United States from the Facility without a National Pollutant Discharge Elimination System ("NPDES") permit as required by the Act. The Clean Water Act provides that, absent a permit and subject to certain limitations, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a).

Although, as described above, you discharge storm water contaminated with pollutants storm water associated with industrial activity, wash water contaminated with pollutants from the Facility to waters of the United States, you have not obtained an NPDES permit for such discharges.

2. Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.

In particular, you have not sought coverage under California's General Industrial Storm Water Permit (the "General Permit")[3] by filing a Notice of Intent to Comply with the General Permit (an "NOI"). Thus, you have violated the Act each time that you have discharged storm water or wash water contaminated with pollutants. DeltaKeeper believes that since you began operations at the Facility, you have discharged storm water containing pollutants and storm water associated with industrial activity from the Facility to waters of the United States during at least every rain event over 0.1 inches. Two tables of rain data for the Lodi region are attached hereto as Attachment A.[4] DeltaKeeper believes these tables reflect the rainfall at your facility since 1992. DeltaKeeper hereby puts you on notice that you have committed violations of the Act on each and every date which Attachment A indicates

3. The terms "General Industrial Storm Water Permit" and "General Permit" refer to National Pollutant Discharge Elimination System ("NPDES") General Permit No. CAS000001 issued pursuant to Section 402 of the Act, 33 U.S.C. §1342 by the State Water Resources Control Board and set forth in Water Quality Order No. 97-03-DWQ, as well as the previously applicable NPDES General Permit set forth in Water Quality Order No. 91-13-DWQ and subsequently amended by Water Quality, Order No. 92-12 and Water Quality Order No. 97-03.

4. The two tables provided as Attachment A reflect daily rain data from the two monitoring points closest to Lodi for which data is available. Table A1 (Stockton Fire Station) was compiled by the Western Regional Climate Center. The data in Table A1 is presented in hundredths of an inch. The information in Table A2 (Bear Creek Station) was downloaded from the California Department of Water Resources, Division of Flood Management web page by WaterKeepers Northern California on May 1, 2000. The data in Table A2 is presented in inches.

the rainfall at the Facility exceeded 0.1 inch after the Act became effective or operations commenced at the Facility, whichever date is later. In addition, whether or not such dates are shown on the rainfall data table, DeltaKeeper puts you on notice that you have committed violations of the Act on each and every date on which the rainfall at the Facility exceeded 0.1 inch after the Act became effective or operations commenced at the Facility, whichever date is later. In addition DeltaKeeper DeltaKeeper hereby puts you on notice that you have committed violations of the Act on each and every date on which the facility has discharged contaminated wash water.

DeltaKeeper believes the Facility has been in operation since at least 1979. Thus, unlawful discharges from the Facility have occurred on a continuous basis since operations commenced, or since the date the Act became effective, whichever is later. These unlawful discharges are ongoing. Each discharge from your facility constitutes a separate violation of the Act. You are subject to penalties for violations of the Act occurring within the past five (5) years.

2. Failure to Obtain Permit Coverage

A review of the records of the Central Valley Regional Water Quality Control Board indicates that you have not filed an NOI. The failure to file an NOI constitutes a violation of the Clean Water Act and the General Permit. You were required to have filed an NOI by no later than March 30, 1992. Therefore, you have been in daily and continuous violation of the requirement to obtain permit coverage for the Facility on each and every day since March 30, 1992 and

will continue to be in violation every day that you fail to submit an NOI for coverage under the General Permit. You are subject to penalties for violations of the Act occurring within the past five (5) years.

3. Discharges in Violation of the General Permit

Provision A (2) of the General Permit prohibits storm water discharges and authorized non-storm water discharges which cause or threaten to cause pollution, contamination, or nuisance. Provision C (1) of the General Permit prohibits storm water discharges to surface or groundwater that adversely impact human health or the environment. Provision C (2) prohibits storm water discharges and authorized non-storm water discharges which cause or contribute to an exceedance of any water quality standards contained in applicable State plans and the applicable Regional Water Quality Board Basin Plan.

As described above in sections C and D.1. and in Attachment A, DeltaKeeper believes that you have discharged and continue to discharge contaminated storm water during every rain event where rainfall exceeds 0.1 inch at the Facility. DeltaKeeper believes that each of these discharges has caused or has threatened to cause pollution, contamination, and nuisance. In addition, DeltaKeeper believes each of these discharges has adversely impacted human health and the environment. Finally, DeltaKeeper believes that each of these discharges has caused or contributed to the exceedance of water quality standards.

Appendix B

DeltaKeeper believes these unlawful discharges from the Facility have occurred on a continuous basis since March 30, 1992, or the date operations at the Facility commenced, whichever is later. These unlawful discharges are ongoing. Each discharge from your Facility constitutes a separate violation of the General Permit and the Act. You are subject to penalties for violations of the General Permit and the Act within the past five (5) years:

4. Failure to Comply with Terms of the General Permit

The General Permit requires storm water dischargers to comply with its terms, including, *inter alia*, the development and implementation of a Storm Water Pollution Prevention Program ("SWPPP"), the development and implementation of a Monitoring and Reporting Program, the implementation of Best Available Technology Economically Achievable ("BAT") and Best Conventional Pollutant Control Technology ("BCT") and the elimination of non-storm water discharges. You have not complied with the terms of the General Permit. Among other things, you have not prepared and implemented an adequate SWPPP or an adequate Monitoring and Reporting Program for the Facility. Further, you have not implemented BAT/BCT.

a. *Storm Water Pollution Prevention Plan*

Section A (1) and Provisions B (3) and E (2) of the General Permit require dischargers of storm water associated with industrial activity to develop and implement an adequate

SWPPP no later than October 1, 1992.[5] If industrial activities commenced at the facility after October 1, 1992 these provisions require that the operator develop and implement an adequate SWPPP when industrial activities begin.

The SWPPP must also include, among other elements: (1) a description of potential sources of pollutants to the storm water system; (2) a site map showing the storm water conveyance system and areas of actual and potential pollutant contact; (3) a description of storm water management practices and preventive maintenance; (4) a summary of storm water sampling points; (5) a description of management practices that achieve BAT/ BCT.

Information available to DeltaKeeper indicates that you have not developed and implemented an adequate SWPPP for the Facility. You were required to have prepared and implemented an adequate SWPPP by no later than October 1, 1992 (or prior to operation if the Facility began operation after October 1, 1992). Therefore, you have been in daily and continuous violation of the requirement to develop and implement an adequate SWPPP for the Facility on each and every day since October 1, 1992 and will continue to be in violation every day that you fail to develop and implement an adequate SWPPP. You are subject to penalties for violations of the General Permit and the Act occurring within the past five (5) years.

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5. These Sections also require dischargers covered by the General Permit that submitted an NOI pursuant to Order No. 91-0113-DWQ (as amended by Order No. 92-12) to continue to implement their existing SWPPPs and to implement any necessary revisions to their SWPPP in a timely manner, but in no case later than August 1, 1997.

Appendix B

b. *Monitoring and Reporting Program*

Provisions E (3) and (6) and Section B (1) of the General Permit require dischargers of storm water associated with industrial activity to develop and implement an adequate written Monitoring and Reporting Program no later than October 1, 1992.[6] If industrial activities commenced at the facility after October 1, 1992 these provisions require that the operator develop and implement an adequate written Monitoring and Reporting Program when industrial activities begin.

Sections B (3) and (4), and Section A (9) require dischargers to conduct site inspections to identify all areas contributing to storm water discharges, to evaluate the effectiveness of Best Management Practices (BMPs) in reducing pollutant loading, and to evaluate whether pollution control measures set out in the SWPPP are adequately and properly implemented. Sections C (9) and (10) require dischargers to certify, based on the annual site inspection, that the permitted facility is in compliance with the General Permit and to report any noncompliance with its terms.

Sections B (3) and B (4) further require dischargers to conduct observations to identify sources of non-storm water pollution and to identify all storm water discharge locations

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6. These sections also require dischargers covered by the General Permit that submitted an NOI pursuant to Order No. 91-0113-DWQ (as amended by Order No. 92-12) to continue to implement their existing monitoring program and to implement any necessary revisions to their monitoring program in a timely manner, but in no case later than August 1, 1997.

that produce a significant storm water discharge. Section B (5)(c)(i) requires dischargers to sample and analyze storm water during the wet season for total suspended solids ("TSS"), pH, specific conductance, and total organic carbon ("TOC") or oil and grease. Section B (5)(c)(ii) requires sampling for toxic chemicals and other pollutants that are likely to be present in the storm water discharges. Section B (5)(a) requires dischargers to collect samples from all locations where storm water is discharged.

Information currently available to DeltaKeeper indicates that you have not developed or implemented an adequate Monitoring and Reporting Program for the Facility. You were required to have prepared and implemented an adequate Monitoring and Reporting Program by no later than October 1, 1992 (or prior to operation if the Facility began operation after October 1, 1992). Therefore, you have been in daily and continuous violation of the monitoring and reporting requirements for the Facility every day since October 1, 1992 and will continue to be in violation every day that you fail to develop and implement an adequate Monitoring and Reporting Program. You remain subject to penalties for violations of the General Permit Act occurring within the past five (5) years.

c. *Annual Reports and Reports of Violations*

Provision E (6) and Sections A (9), B (14), C (9), (10) and (11) of the General Permit require dischargers of storm water associated with industrial activity to submit an Annual Report by July 1 of each year to the executive officer of the relevant Regional Water Board. The Annual Report must

include a summary of visual observations and sampling results, an evaluation of the visual observation and sampling analysis results, laboratory reports, a report of any non-compliance, the Annual Comprehensive Site Compliance Evaluation Report, an explanation of why a facility did not implement any activities required by the General Permit, visual observation and sample collection exception records, the method detection limit of each analytical parameter, and the signature and certification of an appropriate individual. The first Annual Report was due July 1, 1993. If industrial activities commenced at the Facility after July 1, 1993 an annual Report was due on the July 1 following the commencement of operations at the facility.

In addition, Section C (11) requires dischargers to report to the relevant Regional Board and other agencies any planned changes to the facility in advance of such changes, as well as any anticipated non-compliance with the General permit at the facility in advance of such noncompliance.

Information currently available to DeltaKeeper indicates that you have not submitted the required Annual Reports. You were required to have submitted an Annual Report for each year on July 1 of every year since 1993, inclusive. Therefore, you have been in daily and continuous violation of the Annual Report requirement for the Facility on each and every day you failed to submit a required Annual Report (i.e., since July 1, 1993) and will continue to be in violation every day that you fail to submit all of the required Annual Reports. You are subject to penalties for violations of the General Permit and the Act occurring within the past five (5) years.

Appendix B

c. *Implementation of BAT/BCT*

Provision B (3) of the General Permit requires dischargers covered by the General Permit to reduce or prevent pollutants associated with industrial activity in storm water discharges and in authorized non-storm water discharges through implementation of Best Available Technology Economically Achievable ("BAT") and Best Conventional Pollutant Control Technology ("BCT").

As described above in section C of this Notice Letter, you have not implemented BAT/BCT to prevent or reduce pollutants associated with industrial activity in storm water discharges and in authorized non-storm water discharges at the Facility. Moreover, you have failed to develop a SWPPP that includes BMPs that would achieve BAT and BCT when implemented. You were required to have achieved BAT/BCT by no later than October 1, 1992 (or prior to operation if the Facility began operation after October 1, 1992). Therefore, you have been in daily and continuous violation of the BAT/BCT requirements for the Facility every day since October 1, 1992 and will continue to be in violation every day that you fail to implement BAT/BCT. You are subject to penalties for violations of the General Permit and the Act occurring within the past five (5) years.

Appendix B

d. *Non-Storm Water Discharges*

Provision A (1) of the General Permit prohibits all non-storm water discharges other than those specifically set forth in Section D (1)(a) and meeting each of the conditions set forth in Section D (1)(b). Information available to DeltaKeeper indicates that you have failed to eliminate non-storm water discharges such as contaminated wash water from the Facility. You are subject to penalties for violations of the General Permit and the Act occurring within the past five (5) years.

In addition to the violations set forth above, this notice covers all violations of the Clean Water Act by you evidenced by information which becomes available to DeltaKeeper after the date of this Notice of Intent to Sue.

E. PERSONS RESPONSIBLE FOR THE VIOLATIONS

You are the person or persons responsible for the violations described above.

Appendix B

F. OUR NAMES AND ADDRESSES

Our names, addresses and telephone numbers are as follows:

DeltaKeeper
A Project of WaterKeepers Northern California
3536 Ranier Avenue
Stockton, CA 95204
(209) 464-5090

Bill Jennings
c/o DeltaKeeper
A Project of WaterKeepers Northern California
3536 Ranier Avenue
Stockton, CA 95204
(209) 464-5090

G. OUR COUNSEL

DeltaKeeper has retained legal counsel to represent it in this matter. All communications should be addressed to:

Leo P. O'Brien
Legal Director
WaterKeepers Northern California
Presidio Building 1004
P.O. Box 29921
San Francisco, CA 94129-0921
(415) 561-2299

Appendix B

H. PENALTIES

Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects you to a penalty of up to $25,000 per day per violation for all violations occurring during the period commencing five years prior to the date upon which DeltaKeeper files its complaint in this action and ending January 30, 1997; and to a penalty of up to $27,500 per day per violation for all violations occurring after January 30, 1997. In addition to civil penalties, DeltaKeeper will seek injunctive relief preventing further violations of the Act pursuant to Sections 505(a) and (d), 33 U.S.C. §1365(a) and (d), and such other relief as permitted by law. Lastly, Section 505(d) of the Act, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs and fees, including attorneys' fees.

DeltaKeeper believes this NOTICE OF INTENT TO SUE sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period or shortly thereafter, to file a citizen suit under Section 505(a) of the Act against you for the above-referenced violations.

During the 60-day notice period, we would be willing to discuss effective remedies for the violations noted in this letter. However, if you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within the next 20 days so that they may be completed before the end Of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

Appendix B

Sincerely,

s/ Bill Jennings (JT)
Bill Jennings
DeltaKeeper

[Service List intentionally omitted]

Appendix B

--- DAILY PRECIPITATION ---
LOCATION : STOCKTON WSO STATION NUMBER : 048558
START YEAR : 1992 END YEAR : 2000
*** Note *** Provisional Data *** After Year/Month 199912
UNITS : HUNDREDTHS OF INCHES
TX-TempMax TN-TempMin TV-TempAve PR-Precip, DD-DegDys, SF-SnowFall, SD-SnowDepth, EV-Evap, WM-WindMov, WQ-WatEqu

M - Missing data, T - Trace , S - Value for this day included in the subsequent total
FORTRAN FORMAT : (I4, I2, A2, 31I4)
--> (YEAR, MONTH, ELEMENT, 31 DATA VALUES)

YR MO	DAY OF THE MONTH																													
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
1992 1PR	0	0	0	3	69	11	22	0	0	0	0	0	0	0	0	0	T	0	0	0	0	0	0	0	0	0	0	34	0	0	0
1992 2PR	10	0	0	0	T	33	9	0	26	45	80	80	3	119	27	64	0	3	14	23	1	T	0	0	0	0	8	0	0	M	M
1992 3PR	6	6	T	0	71	3	0	0	0	0	0	0	0	24	5	4	T	0	0	0	0	11	0	0	0	0	0	0	0	0	M
1992 4PR	0	0	0	0	0	0	0	0	0	0	0	72	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1992 5PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1992 6PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8	0	0	0	0	0	0	0	0	0	0	0	0	T	4	0	M
1992 7PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1992 8PR	0	0	0	0	0	0	0	0	0	0	0	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1992 9PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
199210PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4	0	0	0	0	0	0	T	40	4	0
199211PR	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	20	0	T	T	0	0	0	0	0	0	0	0	M
199212PR	0	10	5	0	0	53	8	0	42	72	30	0	0	0	0	0	25	0	0	0	0	0	0	0	0	0	0	71	33	0	0
1993 1PR	61	0	0	0	T	68	41	7	11	T	0	63	39	8	12	0	81	7	7	56	27	0	0	0	0	0	0	0	0	0	0
1993 2PR	0	0	0	0	T	0	14	111	1	6	22	0	0	0	0	8	3	84	32	11	T	7	28	0	8	50	0	0	M	M	M
1993 3PR	0	0	1	0	0	0	0	0	0	0	0	0	5	5	0	34	24	0	0	0	0	0	65	27	48	62	42	4	0	0	5
1993 4PR	2	0	0	2	0	0	1	0	0	0	0	0	0	0	0	0	20	0	0	0	0	0	1	0	0	0	0	0	0	0	M
1993 5PR	0	0	T	0	0	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	23	16	T	0	0	0	0	41
1993 6PR	0	0	T	23	1	18	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1993 7PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1993 8PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1993 9PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
199310PR	0	0	0	2	9	0	0	0	0	0	T	0	0	0	20	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
199311PR	0	0	0	0	0	0	0	0	84	0	9	0	T	0	0	0	0	0	0	0	3	0	0	0	0	0	0	39	68	1	M
199312PR	0	0	0	0	0	0	5	7	8	0	49	0	T	27	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	M
1994 1PR	0	0	0	11	0	0	0	5	5	0	0	0	0	0	0	0	0	0	0	0	0	16	59	59	6	0	0	0	0	0	M
1994 2PR	0	0	0	0	0	38	100	0	0	2	0	0	0	0	0	1	35	17	45	1	30	0	0	0	10	0	0	0	M	M	M
1994 3PR	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9	0	6	1	0	0	0	0	0	M
1994 4PR	0	0	0	0	0	0	0	24	0	0	0	0	0	0	0	0	0	0	0	0	0	0	38	4	52	0	0	0	0	0	M
1994 5PR	0	0	0	0	0	25	38	0	0	0	0	0	0	0	0	0	36	69	0	0	0	0	0	0	0	0	0	0	0	T	0
1994 6PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1994 7PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1994 8PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1994 9PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	23	0	0	M
199410PR	0	0	0	42	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
199411PR	3	0	0	0	3	9	11	0	73	T	0	6	0	0	26	0	1	0	0	0	0	0	0	60	11	0	0	0	0	0	M
199412PR	0	4	6	5	0	5	0	0	0	0	5	14	0	29	0	0	0	0	0	0	0	0	16	0	0	0	7	0	0	0	0
1995 1PR	7	9	59	65	2	11	5	21	99	71	2	28	T	44	22	6	0	0	0	3	7	15	12	65	15	51	62	0	0	2	0
1995 2PR	0	2	0	0	T	0	0	2	0	0	0	0	28	0	0	0	0	0	0	0	0	0	0	0	0	0	0	6	M	M	M
1995 3PR	4	5	12	7	T	0	0	20	24	114	74	0	35	7	0	0	0	13	T	51	19	87	18	0	0	0	0	0	0	0	0
1995 4PR	0	0	0	0	0	1	8	0	0	0	0	0	13	0	13	4	0	0	20	T	14	0	0	0	0	0	3	4	3	33	M
1995 5PR	4	0	0	0	0	0	0	0	4	0	0	15	12	0	19	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1995 6PR	0	0	0	0	0	0	0	0	0	0	0	0	0	3	5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1995 7PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1995 8PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1995 9PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
199510PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
199511PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
199512PR	0	0	0	6	0	T	0	0	0	1	153	80	33	0	31	0	0	25	0	0	24	T	0	0	0	2	0	65	9	0	0
1996 1PR	0	0	0	0	0	0	0	0	0	0	0	T	0	0	9	93	0	12	2	21	14	2	6	62	8	T	87	0	0	19	72
1996 2PR	0	0	7	157	4	0	0	0	0	0	0	0	0	0	23	T	0	T	95	34	39	2	0	24	0	0	14	T	3	M	M
1996 3PR	0	0	13	53	11	0	0	0	0	2	8	115	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	5	0	0	0
1996 4PR	67	0	0	0	0	0	0	0	0	0	0	0	0	0	0	12	28	2	10	0	0	0	0	0	0	0	0	0	0	0	M
1996 5PR	0	0	0	0	0	0	0	0	0	0	0	0	0	76	63	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1996 6PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9	0	0	0	0	M
1996 7PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1996 8PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1996 9PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
199610PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	0	0	2	1	0	0	0	77	27	0
199611PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	58	115	2	12	1	47	13	0	0	0	0	4	0	0	0	M
199612PR	12	0	0	12	32	T	0	0	28	86	T	21	3	0	0	T	0	0	0	0	192	16	0	0	0	23	T	1	11	14	1
1997 1PR	80	30	1	T	3	0	0	0	0	T	0	19	0	3	23	1	0	0	0	16	21	104	4	39	18	42	0	1	0	0	M
1997 2PR	0	0	1	11	0	0	T	6	0	0	0	0	0	0	T	11	0	0	0	0	0	0	0	0	0	0	T	0	M	M	M
1997 3PR	0	4	0	0	0	0	0	0	T	0	0	0	0	0	0	8	T	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1997 4PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	10	T	0	0	1	0	0	0	0	0	0	0	0	M
1997 5PR	0	0	0	0	0	0	0	0	0	0	0	0	0	3	T	0	0	0	0	0	T	0	23	0	0	0	0	0	0	0	M
1997 6PR	0	0	16	1	0	0	0	0	0	0	0	0	3	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	T	M
1997 7PR	0	0	0	0	0	0	T	0	0	0	0	0	0	0	0	0	0	0	T	0	0	0	T	0	0	0	0	0	0	0	0
1997 8PR	0	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	T	2	0	0	0	0	0	T	0	0	0	0	0
1997 9PR	0	T	0	0	0	0	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	T	0	0	0	0	M
199710PR	0	T	0	0	0	0	T	0	1	19	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	T	0	0	0	0	0
199711PR	0	T	0	0	0	0	T	0	0	0	63	38	0	0	54	0	30	1	0	9	8	0	T	0	0	2	6	41	57	2	0
199712PR	0	T	2	T	41	11	57	5	0	0	0	0	0	78	0	0	0	T	0	0	T	0	0	0	0	0	0	0	1	64	M
1998 1PR	0	34	T	49	0	15	0	T	45	19	14	83	4	64	37	4	0	65	12	0	0	0	T	0	0	3	0	0	72	0	19
1998 2PR	29	85	146	9	47	43	43	18	0	20	3	54	1	87	0	53	T	T	92	0	55	3	33	0	1	T	0	0	T	M	M
1998 3PR	0	T	0	0	17	1	8	2	0	0	0	0	1	0	0	1	0	0	0	0	5	2	19	39	35	0	2	T	0	0	64
1998 4PR	T	5	39	2	0	15	1	T	0	0	23	4	37	36	0	0	0	0	0	0	0	0	30	0	0	0	0	T	0	0	M
1998 5PR	T	98	35	15	6	16	0	0	0	0	10	102	14	0	0	0	T	0	0	0	0	0	0	0	T	2	1	72	2	0	0
1998 6PR	0	0	0	0	0	0	8	6	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1998 7PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1998 8PR	0	0	0	0	T	0	0	0	T	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1998 9PR	0	T	0	0	T	0	0	T	T	0	0	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
199810PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	T	0	0	102	0	0	T	0	0	T	T
199811PR	0	0	0	0	0	0	2	37	9	0	16	2	0	0	0	0	10	T	0	0	0	T	9	24	0	0	0	49	9	21	41
199812PR	0	0	15	0	11	0	T	T	1	0	0	0	0	3	0	0	0	0	0	T	0	0	0	0	0	0	0	0	T	T	T
1999 1PR	0	0	0	0	0	0	T	T	T	T	0	0	0	1	56	1	0	72	68	7	1	T	21	T	3	10	0	0	0	46	T
1999 2PR	0	0	0	0	0	22	59	15	61	0	0	0	0	5	0	0	17	15	10	0	63	9	0	3	2	0	0	0	M	M	M
1999 3PR	0	T	5	0	0	0	0	0	6	9	0	0	0	0	0	0	0	0	0	13	3	0	2	7	7	18	0	0	0	9	8
1999 4PR	0	0	5	0	56	0	T	31	0	12	9	0	0	0	0	0	0	0	0	0	T	0	0	0	0	0	0	0	0	0	M
1999 5PR	0	5	12	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1999 6PR	0	T	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M
1999 7PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1999 8PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1999 9PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8	0	0	0	0	0	8	0	0	M
199910PR	0	0	0	0	0	0	T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	T	0	0	0	0	0
199911PR	0	0	0	0	0	0	42	11	0	0	0	0	0	T	1	36	0	0	60	T	2	0	0	0	0	0	0	0	18	0	M
199912PR	0	2	0	0	0	0	0	T	28	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2000 1PR	0	0	0	0	0	0	0	0	0	0	47	1	0	0	10	8	14	52	2	5	0	0	84	125	12	0	0	0	0	17	0
2000 2PR	0	1	19	1	1	1	0	1	2	28	4	11	99	3	0	41	0	0	0	55	0	57	67	0	1	0	39	0	33	M	M
2000 3PR	0	7	0	0	26	1	24	6	15	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	M	M	M	M	M

BEST AVAILABLE COPY

Appendix B

DAILY RAIN DATA FOR BCR (BEAR CREEK NEAR LODI) STATION (SENSOR #45), DOWNLOADED FROM CALIFORNIA DEP'T OF WATER RESOURCES DATABASE 5/1/00. DATA IS IN INCHES; M=MISSING DATA.

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
Jan-92	m	m	0	0	0.74	0.12	0.16	0	0	m	m	0	0	0	m	m	m	0	m	m	m	0	0	0	0.25	m	m	0.41	m	m	0
Feb-92	m	m	0	0	0	0.36	0.08	0	0.19	0.71	0.79	1.3	0.12	1.22	0.39	0.47	m	m	0.32	m	m	0	0	0	0	0	0	0	0	0	
Mar-92	m	m	m	0	1.1	0.08	0	0	m	m	0	0	0	0.24	0.27	0.08	m	m	m	0	0	0.08	0	0	0	0	0	0	0	0	m
Apr-92	m	m	m	m	0	0	0	0	0	m	m	m	0	0	0	0	0	0	0	0	0	m	m	m	0	0	m	m	m	0	
May-92	0	m	m	m	m	0	0	m	m	0	0	m	m	m	0	0	0	0	0	0	m	m	0	m	m	m	0	m	0	0	m
Jun-92	m	m	m	0	m	m	m	0	m	m	m	0	0	0	0.04	m	m	0	0	0	m	m	0	m	m	m	0	0	0.12	m	m	
Jul-92	m	0	m	m	m	0	m	m	m	m	m	0	0	m	m	m	m	m	m	0	m	m	m	m	m	m	m	m	m	m	m
Aug-92	m	m	m	m	m	m	m	m	m	m	m	m	m	0	m	m	m	m	m	m	0	m	m	0	m	m	m	0	0	m	m
Sep-92	m	m	m	m	m	m	m	0	m	m	m	m	m	m	m	m	m	m	m	m	0	m	m	m	m	m	m	m	m	m	
Oct-92	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1.73	0.09	0	0	0	0	0	0.08	1.58	3.17	0.42
Nov-92	0	0.52	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	
Dec-92	0	0	0.5	0	0	0.56	0.11	m	0.55	m	0.83	0	0	0	0	0	0.16	0	0	0	0	0	0	0	0	0	0	1.03	0.16	0	m
Jan-93	0.59	0	0	0	0	m	0.91	0.04	0.08	0.04	m	m	0.94	0.12	0.2	0	0.83	0.08	0.04	0.75	0.47	0	0	0	m	0	0	0	0	0	0
Feb-93	0	0	0	0	0.11	0	0.16	1.5	0.04	0.08	0.08	0	0	0	0	0.03	0.16	0.79	0.43	0.08	0.08	0.08	0.57	0	0.04	0.55	0	m			
Mar-93	0	0	0	0	0	0	0	0	m	0	m	0	0	0.04	m	0.39	0.27	0	0	0	0	0	0.79	0.55	0.43	0.71	0.32	0.08	0	0	0.04
Apr-93	0.04	0	0	0.08	0	m	0	0	0	0	0	0	0	0	m	0	0.18	0	m	m	0	m	0.04	0	0	0.04	0	0	0	0	
May-93	0	0	m	m	0	0	0	0	0	m	m	m	m	m	m	m	m	m	m	m	m	m	m	0.47	0.12	0	m	m	0	0	0.43
Jun-93	0	0	0	0.12	0.08	0.27	0.04	0	0	m	m	m	0	0	m	0	m	m	m	m	0	0	m	m	m	m	m	m	m	m	
Jul-93	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Aug-93	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	0	0	0	m	m	m	m	m	0
Sep-93	0	0	0	0	m	m	m	m	m	m	0	m	m	m	m	m	m	m	m	m	m	m	m	m	0	0	m	m	m	m	
Oct-93	m	m	m	m	0	0	0	0	0	0	0.04	0	0.04	0	0.25	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nov-93	m	0	0	0	0	0	0	0	0	0.79	0.04	0.2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.67	0.75	0	
Dec-93	0	0	0	0	0	0	0	0.04	0.24	0	0.4	0	0.04	0.39	0	0	0	0	0.04	0	0	0	0	0	0	0.08	0	0	0	0	0
Jan-94	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Feb-94	0	0	0	0	0	0.63	0.71	0.12	0	0.28	0	0	0	0	0	0.16	1.06	0.08	0.59	0.16	0.12	0	0	0	0	0.04	0	0	0		
Mar-94	0	0	0	0	0.08	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.04	0	0	0	0	0	0	0
Apr-94	0	0	0	0	m	0	m	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.32	0.08	0.43	0	0	0	0	0	
May-94	0	0	0	0	0	0.03	0.06	0.24	0	0	0	0	0	0	0	0	0.16	0.04	0.04	0	0	0	0	0	0	0	0	0	0	0	0
Jun-94	0	0	0	0	0	0	0	0	0	m	m	m	m	0	0	0	0	0	0	0	0	0	0	m	0	m	m	m	m	0	
Jul-94	m	m	m	m	0	m	m	0	m	m	0	0	m	m	0	m	m	0	0	0	0	m	m	m	m	m	m	m	0	0	0
Aug-94	m	0	0	0	m	m	0	0	0	m	m	0	m	m	0	m	0	0	0	m	m	m	0	0	0	0	0	0	m	m	0
Sep-94	m	m	m	m	m	m	0	m	m	m	0	0	m	m	0	m	m	m	m	0	m	m	0	m	m	m	m	0.35	0	m	
Oct-94	m	0	m	m	0	0	0	m	m	0	m	m	0	0	0	0	0	0	0	0	m	m	0	0	m	m	0	0	m	m	0
Nov-94	0	0	0	0	0.16	0.12	0.08	0	0.59	0	0	0.04	0	m	m	0	m	0	0	0	0	0	0	0	0.47	0	0	m	0	0	
Dec-94	0	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	0	0	m	m	m	m	m	m	0	0.04	0	0	0
Jan-95	m	m	m	0.75	0.08	0.12	0.04	57.36	m	0.55	0.04	0.24	0	0.55	0.28	0.12	0	0	0	0.08	0.04	0.59	0.2	0.59	0.24	0.55	0.59	0	m	m	m
Feb-95	m	0	0	0	0.04	0	0	0.2	m	m	0	0	0.31	0.08	0	0	2.91	m	0	m	m	0	0	0	0	0	m	m			
Mar-95	2.95	m	0.2	m	m	m	m	0.38	0.59	0.67	0.51	0	0.24	0.04	0	0	m	m	m	m	0.24	0.91	0.43	m	m	m	m	m	m	m	m
Apr-95	m	m	m	m	m	m	0.24	0	0	m	m	m	0.12	0	0.08	m	m	m	m	0.08	m	m	m	m	m	m	0.04	0.04	0.12	0.16	
May-95	0.31	m	m	m	m	m	m	m	m	m	0	0	0.28	0.08	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Jun-95	m	m	m	m	m	m	m	m	m	m	m	m	m	0	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	
Jul-95	m	m	m	0	0	0	0	0	m	m	m	m	m	m	m	m	m	m	m	m	m	0	m	m	m	m	m	m	m	m	m
Aug-95	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Sep-95	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	
Oct-95	m	m	m	m	m	m	m	m	m	m	m	m	m	m	0	0	m	m	m	0	0	0	0	m	m	0	0	0	0	0	0
Nov-95	0	m	m	0	0	m	m	0	0	0	0	0	m	m	0	0	0	m	m	m	0	0	m	m	0	0	0	0	0	0	
Dec-95	0.1	0	0	0	0	0.04	0	0	m	m	1.77	0.51	0.67	0.04	0.31	0	m	m	0	0	m	m	0	0	0	0	0.04	0	0.87	0.08	0
Jan-96	0	0	0	0	m	m	0	0.04	0	0	0	0	0	0	0.2	1.3	0	0.12	0	m	0.28	0.04	0.08	0.87	0.04	0	0.63	m	m	m	0.79
Feb-96	0.1	0	0.04	0.94	0.2	0	0	0	0	0	0	0	m	10.75	0.12	0.04	0	0.04	1.02	0.35	0.43	0.04	0	0.16	0	0	0.12	0	0.08		
Mar-96	0	0	0.16	1.02	0.08	0	0	0	0	0	0.35	0.9	0	m	m	0	0	0	0	m	m	0	0	0	0	0	m	0.04	0	0	0
Apr-96	0.59	0	0	0	m	m	0	0	0	0	0	0	0	0	0	0.12	0.63	0	0.08	0.04	0	0	0	0	m	m	0	0	m	m	
May-96	0	0	m	m	0	0	0	0	0	0	m	m	0	0	0.75	0.43	0	0	m	m	0.04	0	m	m	m	m	0	0	m	m	0
Jun-96	0	m	m	m	m	m	m	m	m	0	0	0	m	m	0	0	0	m	m	0	0	m	m	0	0	1.14	0	m	m	m	
Jul-96	m	m	m	m	m	m	m	m	m	0	m	m	0	m	m	0	0	0	m	m	m	m	m	m	0	m	m	m	m	m	m
Aug-96	m	m	0	m	m	0	0	0	m	m	m	m	0	m	m	m	m	0	0	0	0	m	m	0	0	0	m	m	0	0	
Sep-96	0	0	0	0	m	m	0	m	m	m	m	0	0	m	m	0	0	0	m	m	0	0	0	0	m	m	0	m	m	m	
Oct-96	m	m	0	0	0	0	m	m	0	0	0	m	m	0	m	m	0	0	0	0	m	m	0	0	0	0	0	0	1.22	0.16	0
Nov-96	0	0	0	0	0	0	0	0	0	m	m	0	0	0	0	0.51	0.95	0.04	0.12	0	0.63	0.16	0.04	0	m	m	0	0.04	0	0	
Dec-96	0.04	0	0	0.16	0.39	0.08	0	0	0.47	1.02	0	0.44	0.04	0.04	-9999	0	0	0	-9999	0	2.13	0.12	0	0	0	0.31	0.04	0	0.24	0.28	0.08

Table A2

Appendix B

DAILY RAIN DATA FOR BCR (BEAR CREEK NEAR LODI) STATION (SENSOR #45), DOWNLOADED FROM CALIFORNIA DEP'T OF WATER RESOURCES DATABASE 5/1/00. DATA IS IN INCHES; M=MISSING DATA.

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
Jan-97	1.26	0.94	0	0	0	0	0	0	0	0	0	0.24	0	0	0.16	0	0	0	0	0.24	0.24	1.42	0.2	0.31	0.2	0.67	0	0	0	0	0
Feb-97	0	0	0	m	m	6.26	0.12	0.04	0	0	0	0	m	0	0	0	m	0	0	0	0	0	m	m	m	0	0	m			
Mar-97	0	m	m	m	m	m	m	0	0	m	m	0	0	m	m	m	0.04	0	m	m	m	0	0	0	0	0	m	m	m	m	0
Apr-97	0	0	0	m	m	0	0	m	m	m	m	0	0	m	m	0	m	m	0.04	0	0	0	m	0	0	0	m	m	0	0	
May-97	m	m	0	0	m	m	0	m	m	0	m	m	m	m	0	m	m	m	m	m	m	m	0.28	0	0	0	m	m	0	m	m
Jun-97	m	m	m	0.04	0	m	m	0	m	m	0	0	0	0	0	0	m	m	m	m	m	m	m	m	m	m	m	m	m	m	
Jul-97	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Aug-97	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Sep-97	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Oct-97	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Nov-97	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Dec-97	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Jan-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Feb-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Mar-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Apr-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
May-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Jun-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	
Jul-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Aug-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Sep-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	
Oct-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Nov-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	
Dec-98	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Jan-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Feb-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Mar-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Apr-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
May-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Jun-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Jul-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Aug-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Sep-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Oct-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m
Nov-99	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m	m											
Dec-99																															
Jan-00																															
Feb-00																															
Mar-00																															
Apr-00																															
May-00																															

Table A2 (continued)